SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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INDEX NO. 152614/2017

KATHLEEN MAY GORDON,

Plaintiff,

MOTION SEQ. NO. 001, 002

- v -

CONSOLIDATED EDISON, INC.,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 11, 13, 14, 15, 16, 17, 24, 25

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 9, 10, 12, 18, 19, 20, 21, 22, 26, 27, 28

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is ordered that the motions and cross motions are decided as follows.

This decision and order consolidates for resolution the motions and cross motions filed under motion sequence numbers 001 and 002.

In this action by plaintiff Kathleen May Gordon seeking damages against defendant Consolidated Edison, Inc. ("CEI") arising from alleged disability discrimination: 1) defendant moves, pursuant to CPLR 3211(a) (1) and (a)(7) (mot. seq. 001), to dismiss the complaint based on documentary evidence and for failure to state a cause of action; 2) plaintiff cross-moves, pursuant to CPLR 3025(b) (mot. seq. 001), seeking to amend the complaint to add as a defendant Consolidated Edison Company of New York, Inc. ("CECNY"); 3) defendant moves, pursuant to

CPLR 3211(a)(1) and (a)(7) to dismiss the complaint (mot. seq. no. 002); and 4) plaintiff moves, pursuant to CPLR 3025(b) (mot. seq. 002), to amend the complaint to add CECNY as a defendant. After oral argument, and after a review of the parties' motion papers and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff alleges that, in or about June of 2016, she was offered the position of Senior Financial Analyst in Investor Relations at CEI. Doc. 1, at par. 4.[1] As part of the hiring process, she underwent a physical examination, at which time she disclosed that she had a digestive disorder called ulcerative colitis, a type of irritable bowel syndrome. Id., at par. 5. She began working for CEI on August 1, 2016. Id., at par. 6.

On December 21, 2016, CEI administered a random drug test to plaintiff. Id., at par. 8. Sheila Abner of the human resources department of CEI called plaintiff on December 29, 2016 to advise her that she had failed the drug test. Id., at par. 9. During the call, plaintiff advised Ms. Abner that she was "part of a New York State medicinal marijuana program." Id., at par. 11. Plaintiff also advised Jan Childress, Head of Investor Relations and plaintiff's supervisor, that she was part of a medicinal marijuana program. Id., at par. 12. On January 10, 2017, plaintiff sent an email to human resources and Mr. Childress reiterating that she was a certified patient of the New York medicinal marijuana program. Id., at par. 18.[2] The following day, January 11, 2017, plaintiff was terminated due to a violation of company drug policy based on her failed drug test. Id., at par. 19. In her complaint, plaintiff claimed that she had been using marijuana at that time to treat the debilitating symptoms caused by her irritable bowel syndrome. Id., at pars. 20-21.

[1] All references are too the documents filed with NYSCEF in this matter.
[2] Although the complaint refers to this date as January 10, 2016, this is evidently a typographical error.

On March 20, 2017, plaintiff commenced the captioned action by filing a summons and complaint. Doc. 1. As a first cause of action, plaintiff alleged that defendant discriminated against her because of her disability, and her use of medical marijuana related thereto, and failed to reasonably accommodate her, thereby causing her damages by violating Public Health Law section 3369, which allows a "certified" individual access to medical marijuana, and Executive Law section 296, the New York State Civil Rights Law, which imposes civil penalties against employers who discriminate against employees based, inter alia, on disability. Id., at pars. 34, 36-37. As a second cause of action, plaintiff alleged that she has been damaged due to defendant's violation of New York City Administrative Code section 8-502(a), which allows for civil actions by persons aggrieved by discriminatory practices. Id., at par. 39. As a third cause of action, plaintiff claimed that she was damaged due to defendant's violation of Public Health Law section 3369. Id., at par. 41.

On April 20, 2017, CEI moved, pursuant to CPLR 3211(a)(1) and (a)(7) (mot. seq. 001), to dismiss the complaint based on documentary evidence and for failure to state a cause of action. Doc. 3. In support of the motion, counsel for CEI explained that CEI, the named defendant, was a holding company separate from CECNY and that plaintiff was employed by CECNY from approximately August 1, 2016 until January 11, 2017. Id., at pars. 5-6. CEI's attorney annexed to his motion CECNY's drug and alcohol testing protocols, which state, inter alia, that "[c]ompany employees are prohibited from using illegal drugs or engaging in illegal or unauthorized use of drugs at any time." Ex. B to Doc. 3, at par. 4.1. The protocols further provided that "[f]ailure to comply [with the same] may result in disciplinary action or denial of employment." Id., at par. 4.4.

CEI also submitted in support of its motion a New York State Department of Health "Medical Marijuana Program Registry Identification Card" ("the marijuana registry card") issued to plaintiff on January 9, 2017, two days before her termination. Ex. C to Doc. 3.

Stephanie Barnhart, M.D., an administrative physician for CECNY, states in an affidavit in support of the motion that plaintiff, an employee of CECNY, tested positive for marijuana on or about January 5, 2017. Doc. 4, at par. 5. Plaintiff admitted to Dr. Barnhart that she had smoked marijuana the prior weekend and that she had pursued certification for the use of medical marijuana for treatment of her ulcerative colitis after the drug test. Id., at par. 6. Although plaintiff presented Dr. Barnhart with a medical marijuana certification form, the latter deemed plaintiff unfit for duty because she had tested positive for a drug which violated the company's drug testing policy. Id., at pars. 8-9.[3]

Mr. Childress, plaintiff's direct supervisor, also submitted an affidavit in support of CEI's motion. Doc. 5, at par. 1. He stated, inter alia, that, on January 5, 2017, he learned that plaintiff was not a certified medical marijuana patient at the time of her drug test and that he and plaintiff's second-line supervisor determined that termination was appropriate for violating the company's drug policy. Id., at pars. 3-5. On January 11, 2017, he advised plaintiff that her employment had been terminated. Id., at par. 6. Mr. Childress did not address whether he was aware that plaintiff had obtained a marijuana registry card prior to the date on which she was terminated.

In a memorandum of law in support of its motion, CEI argues, inter alia, that, since plaintiff was not a certified medical marijuana patient protected by New York's Compassionate Care Act ("CCA") as of the time she smoked marijuana and failed her drug test in December 2016, she

[3] Dr. Barnhart did not explain the significance of this form or stated whether and/or when it was dated.

cannot establish that she had a disability at that time and that she was terminated due to that disability. Nor, urges CEI, can plaintiff assert that it failed to accommodate her.

On April 20, 2017, CEI also filed an amended notice of motion (mot. seq. 002) seeking to dismiss the complaint under motion sequence 002. Doc. 9.

On July 7, 2017, plaintiff cross-moved (mot. seq. 001) to amend the complaint to add as a defendant CECNY. Doc. 16. The same day, plaintiff filed a cross motion seeking the same relief under motion sequence 002. Doc. 18.

In memoranda of law in opposition to defendant's motions and in support of its cross motions to amend the complaint, plaintiff argues, inter alia, that, as a medical marijuana user, she is entitled to reasonable accommodation in the workplace and cannot be penalized for marijuana use. Docs. 17 and 22. Plaintiff claims that she not only failed to receive such reasonable accommodation, but was also terminated for her legal use of marijuana.

In reply memoranda in further support of its motions to dismiss and in opposition to plaintiff's cross motions to amend, CEI argues, inter alia, that plaintiff "did not obtain certification and approval to use 'medical marijuana' until after her random drug test." Docs. 24 and 26, at p. 1. Indeed, CEI asserts, plaintiff admits in her memoranda of law in opposition that, had she known she would be drug tested during her employment, she "would have undertaken earlier to satisfy the numerous regulatory requirements to certification." Docs. 17 and 22, at p. 2.

LEGAL CONCLUSIONS:

CEI's Motion for Dismissal

Where, as here, a motion is addressed to the sufficiency of the complaint, the facts pleaded must be assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d

481 (1980). "[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 (1st 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 (1st Dept 1977) quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956). In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Further, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

Here CEI's motion to dismiss is denied. Although CEI established that, as of December 21, 2016, the day plaintiff underwent her drug test, and January 5, 2017, the day on which plaintiff tested positive for marijuana, plaintiff had not yet received her marijuana registry card from the New York State Department of Health,[4] plaintiff did not receive the marijuana registry card until January 9, 2017. Since it is unclear whether CEI was aware that plaintiff had received the marijuana registry card prior to the time she was terminated on January 11, 2017, CEI may have discriminated against plaintiff based on her disability and its failure to accommodate her and its motion to dismiss is thus denied.

[4] Public Health Law section 3362(1) requires that one using, delivering, transporting or administering medical marijuana be a "certified patient or designated caregiver possessing a valid registry identification card."

Plaintiff's Cross Motion To Amend

Pursuant to CPLR 3025(b), a party may amend its pleading at any time by leave of court, and leave shall be freely given upon such terms as may be just. It is within the court's discretion whether to permit a party to amend its complaint. *See Peach Parking Corp. v 345 W. 40th Street, LLC*, 43 AD3d 82 (1st Dept 2007). On a motion for leave to amend, a plaintiff need not establish the merit of its proposed new allegations (*see Lucindo v Mancuso*, 49 AD3d 220, 227 [1st Dept 2008]), but must show that the proffered amendment is not palpably insufficient and not clearly devoid of merit. *See Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 (1st Dept 2007); *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 (1st Dept 2010). Here, plaintiff's attorney represents that CEI, the named defendant, was a holding company separate from CECNY and CEI submits proof that CECNY was plaintiff's actual employer. Thus, it appears as if plaintiff's claims against CECNY have a colorable basis (*see NAB Construction Corp. v Metropolitan Transportation Authority*, 167 AD2d 301 [1st Dept 1990]). Although plaintiff submits a proposed amended complaint naming CECNY, she fails to submit a proposed supplemental summons naming CECNY and thus the cross motion is denied with leave to renew upon proper papers.[5]

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant Consolidated Edison, Inc. to dismiss the complaint (motion sequence 001) is denied as academic; and it is further

[5] It is unclear why CEI's amended notice of motion was filed under a separate motion sequence number. The only difference between the notice of motion and the amended notice of motion is that the former was returnable May 31, 2017 and the latter was returnable June 7, 2017. Docs. 2 and 9. Plaintiff's cross motions under sequence numbers 001 and 002 seek identical relief. Thus, this Court denies the motion and cross motion under sequence 001 as academic. *See generally, M & V Concrete Constr. Corp. v Modica*, 76 AD3d 614 (2d Dept 2010).

ORDERED that the cross motion by plaintiff Kathleen May Gordon to amend the complaint (motion sequence 001) is denied as academic; and it is further

ORDERED that the motion by defendant Consolidated Edison, Inc. to dismiss the complaint (motion sequence 002) is denied; and it is further

ORDERED that the cross motion by plaintiff Kathleen May Gordon to amend the summons and complaint to name as a defendant Consolidated Edison Company of New York, Inc. (motion sequence 002) is denied with leave to renew upon proper papers; and it is further

ORDERED that plaintiff is directed to serve this order with notice of entry within 20 days of the entry of this order; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in this matter on October 2, 2018 at 80 Centre Street, Room 280 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

5/29/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
		GRANTED	[ ] DENIED		GRANTED IN PART	[X]	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE