

New York State Div. of Human Rights v Greenburgh Hous. Auth.
2018 NY Slip Op 34077(U)
March 8, 2018
Supreme Court, Westchester County
Docket Number: Index No. 63559/2017
Judge: Terry Jane Ruderman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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NEW YORK STATE DIVISION OF HUMAN
RIGHTS, on the complaint of JILL DENNIS,

Plaintiff,
-against-

DECISION and ORDER
Sequence No. 1
Index No. 63559/2017

GREENBURGH HOUSING AUTHORITY,

Defendant.

-----X
RUDERMAN, J.:

The following papers were considered on the motion by defendant Greenburgh Housing Authority to dismiss the complaint pursuant to CPLR 3211(a)(5) and (a)(7):

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - O	1
Affirmation in Opposition, Exhibits 1 - 6	2
Reply Memorandum of Law	3

This action is based on a complaint filed by Jill Dennis (“complainant”) with the New York State Division of Human Rights (“DHR”) on July 24, 2014, claiming that defendant Greenburgh Housing Authority (“Housing Authority”) discriminated against her on the basis of disability. The underlying complaint was the third in a series of four. Complainant first filed a complaint with DHR against the Housing Authority on June 19, 2012 (DHR Complaint # 10155683), alleging that the Housing Authority discriminated against her by denying her an apartment on the basis of age; on this complaint DHR issued a “no probable cause” finding, which complainant did not challenge. Her second complaint was filed on January 2, 2013 (DHR Complaint # 10159304), alleging that she was improperly denied an apartment because the Housing Authority wrongly failed to accept her claim that she was “disabled”; her CPLR Article

78 challenge to the second finding was dismissed on June 27, 2014. Her third complaint was filed on July 14, 2014 (DHR Complaint # 10170245), and while DHR initially made a “no probable cause” finding, complainant’s Article 78 petition was granted by order dated November 13, 2015 (Zambelli, J.), and the matter was remanded back to the DHR for further action. DHR subsequently issued a probable cause finding, referring for hearing the issues of whether the Housing Authority discriminated against complainant in failing to recognize her as disabled for purposes of a housing waiting list; and whether the decision to enlarge the waiting list in 2014 was the product of retaliatory intent based on complainant’s two prior complaints. The Housing Authority exercised its right to request the matter be heard in court under Executive Law § 297.9, and this action was thereafter commenced.

The complainant’s fourth complaint, filed on October 5, 2015, again alleged that the Housing Authority discriminated against her on the basis of disability (DHR Complaint No. 10177934). On March 29, 2016, the DHR issued a “no probable cause” finding, observing that the complainant had consistently risen on the Housing Authority’s waiting list and was then number one on both zero and one-bedroom waiting lists, and indeed, by that time had obtained an apartment from the Housing Authority. While another person had obtained an apartment prior to complainant, that person had been on the list longer. Complainant’s Article 78 petition challenging that “no probable cause” finding was dismissed on September 30, 2016 (Zambelli, J.).

The complaint filed by DHR in this action asserts three causes of action brought under the Human Rights Law (Executive Law Article 15). The first cause of action alleges that defendant discriminated against complainant, a person with disabilities, by failing to treat her as a disabled

a disabled person when prioritizing the individuals on its waiting list for apartments, from September 2005 until February 2016, and seeks damages based on an alleged violation of Executive Law §§ 296.2-a(a) and 296.5(a)(1). The second cause of action alleges a violation of § 296.18, based on a failure to make a reasonable accommodation. Plaintiff's third cause of action asserts that in 2014 defendant placed complainant in a lower position on the waiting list in retaliation for her two prior complaints with DHR, delaying the lease of an apartment to her until February 2016. The complaint seeks awards of compensatory and punitive damages, as well as civil fines and penalties.

In its notice of motion to dismiss, defendant Housing Authority seeks the following relief: "a) Dismissing plaintiff's claims to the extent they are premised on allegations alleged in plaintiff's first, second, and fourth New York State Division of Human Rights complaints filed in 2012, 2013, and 2015, respectively; b) Dismissing plaintiff's second cause of action for denial of a reasonable accommodation; c) Limiting the remaining causes of action to incidents alleged in plaintiff's third New York State Division of Human Rights complaint filed in 2014 and occurring during the period February 21, 2013 to June 4, 2014." It contends that based on the election of remedies doctrine and/or collateral estoppel, DHR may not rely on factual allegations that were included in the two earlier, dismissed complaints from 2012 and 2013, or those in the subsequent, dismissed complaint filed in 2015, and that the Court's review should be limited to new allegations contained in the 2014 DHR complaint. Further, the Housing Authority argues that based on the application of the three-year statute of limitation, the relied-upon events must be limited to those that occurred starting from February 21, 2013, through June 4, 2014. As to the second cause of action, the Housing Authority points to complainant's acknowledgment that

she was not seeking reasonable accommodation.

Analysis

Initially, DHR does not oppose the branch of the Housing Authority's motion to dismiss the second cause of action for a reasonable accommodation.

Election of Remedies and Collateral Estoppel

As to the Housing Authority's election of remedies and collateral estoppel arguments, DHR does not dispute that they apply here to narrow the scope of the allegations supporting the first and third causes of action. The election of remedies doctrine prohibits a complainant who filed an administrative complaint directly with the Division from also filing a civil action "based on the same events" (*Rodriguez v Dickard Widder Indus.*, 150 AD3d 1169, 1171 [2d Dept 2017]; see also *Vetro v Hampton Bays Union Free Sch. Dist.*, 148 AD3d 963, 964 [2d Dept 2017]).

The doctrine applies even though a complainant may add additional facts or re-label the claim as a different type of discrimination (see *Craig-Oriol v Mount Sinai Hosp.*, 201 AD2d 449, 450 (2d Dept. 1994)). Only if the division "has dismissed [the Division] complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled" may a person pursue the same allegations in civil court (Executive Law §297[9]).

DHR acknowledges that although the third complaint alleges misconduct by the Housing Authority from 2006 through June 4, 2014, it may not rely in the present action on factual allegations that were contained in the previous two complaints, which covered the time periods from October 2005 through October 2011, and October 2005 through Dec. 21, 2012, respectively. DHR proposes that the proper remedy is to strike allegations concerning

discriminatory conduct from 2005 through December 21, 2012, and from July 15 through July 17, 2015, the time periods alleged in DHR Complaints 1, 2, and 4. It argues that discriminatory conduct that occurred during times not covered by those other DHR complaints, specifically from December 22, 2012 through July 15, 2015, and July 17, 2015 through February 2016 may be alleged without running afoul of the election of remedies and collateral estoppel doctrines.

The Housing Authority suggests that the fourth DHR complaint covered the whole period covered by all the previous complaints, and therefore precludes all claims here. This argument is rejected. It is true that the complaint reiterated the general claim underlying the earlier claims, namely that the Housing Authority failed to recognize her disability and to treat her application appropriately based on that disability, and that its denial of an apartment was also based on a retaliatory motive. However, the particulars of the fourth DHR complaint concern the Housing Authority's opening of its waiting list on July 15-17, 2015, resulting in its placement of new applicants ahead of her on the list, based on its failure to recognize her disabled status.

The proper remedy is that proposed by DHR: to strike allegations in the complaint concerning discriminatory conduct from 2005 through December 21, 2012, and from July 15 through July 17, 2015, the time periods alleged in DHR Complaints 1, 2, and 4.

Statute of Limitations

Based on the ruling set forth above, the period covered by the complaint at issue here, after applying the election of remedies and collateral estoppel doctrines to preclude the dates covered by the earlier complaints, begins on December 22, 2012. The Housing Authority further contends that the statute of limitations requires further limitation of the claims to those occurring on or after February 21, 2013.

There is no dispute that Human Rights Law (Executive Law) § 296 is governed by a three year statute of limitations (*see Forsyth v Federation Employment & Guidance Serv.*, 409 F3d 565, 572 [2d Cir 2005]). Nor does the Housing Authority claim that the action was untimely commenced. Rather, it argues that application of the three-year statute of limitations requires precluding as untimely portions of the factual claims.

The Housing Authority reasons that DHR may only rely on alleged misconduct counting back three years from the date of the complaint in this action, which, after allowing for the tolling of the claim during the pendency of the administrative proceeding, brings it to February 21, 2013. Specifically, it calculates that because 1 year, 7 months, and 4 days passed between the election to litigate on January 25, 2016 and the filing of the complaint on August 29, 2017, this action can only go back another 1 year, 4 months, and 26 days before the July 17, 2014 filing of the third DHR complaint on July 17, 2014.

DHR counters that because “election” suits such as this one – as opposed to suits brought directly in court by the private individual – cannot be filed until after an individual has filed an administrative complaint, the complaint has been investigated, a probable cause determination issued, and one of the parties has then elected to have the matter tried in court, the cause of action does not accrue until that election is made. In contrast to the Housing Authority, which offered no case authorities for its proposal to limit the factual allegations from the DHR complaint on which this action may be based, DHR cites *New York State Division of Human Rights v Giffuni* (40 AD3d 361 [1st Dept 2007]). In *Giffuni*, in discussing the timeliness of the service of a summons and complaint, the Appellate Division specifically referred to the statute of limitations as “the three-year statute of limitations (CPLR 212[2] [*measured from defendants’ section 297(9)*”).

election])” (*id.* at 362 [emphasis added]). Since the claim that forms the basis of this action did not accrue until the date of election, January 25, 2016, not only is this action indisputably timely, having been commenced on August 29, 2017, but it properly encompasses all the still-viable misconduct claims contained in the underlying DHR complaint. Moreover, even if the Housing Authority correctly calculated the period to which the claims at issue here must be limited, DHR has stated an alternative justification to allow it to sue based on all the remaining allegations that have not been precluded under collateral estoppel and election of remedies. That is, because the claim of a discriminatory failure to recognize complainant’s disability is of an ongoing nature, the continuing violation theory would permit reaching back to the earlier conduct.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted as to the second cause of action, and to the extent of striking the allegations in the complaint concerning discriminatory conduct from 2005 through December 21, 2012, and from July 15 through July 17, 2015, and is otherwise denied; and it is further

ORDERED that the parties are directed to appear at the Preliminary Conference Part, Westchester County Supreme Court, room 811, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York, on Monday, April 23, 2018 at 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
March 8, 2018


HON. MERRY JANE RUDERMAN, J.S.C.