518516-2019

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.:
Motion Date: 1-27-20
Mot. Cal. No.: 6

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LUKE BROUILLARD,

Plaintiff,

-against-

DECISION/ORDER

SUNRUN, INC.,

Defendant.

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The following papers numbered 1 to 3 were read on this motion:

Papers:	**Numbered:**
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/Memos of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memos of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memos of Law.....	3
Other.....	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for disability discrimination under the New York State Human Rights Law; particularly New York State Executive Law § 296, *et seq.*, and under the New York City Administrative Code § 8-502[a], the defendant moves for an order pursuant to CPLR § 3211(a)(7) dismissing the complaint for failure to state a cause of action.

In the complaint, the plaintiff alleges that on or about December 12, 2018, the defendant, Sunrun, Inc., offered him a job as a Field Sales Consultant. Plaintiff alleged that when he was offered the job, he was suffering from congenial bilateral dislocated patellas, patella alta, hypoplastic patella and a destro convex scliotic curvature, all of which caused

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him chronic pain. He alleged that these conditions rendered him disabled.

He alleged that on December 17, 2018, before he began working for Sunrun, Sunrun subjected him to a drug test. He alleged that on December 21, 2018, he was informed by Sunrun that he had tested positive for marijuana. Plaintiff maintained that he responded to this by informing Sunrun that he had a prescription for medical marijuana due to chronic pain and that he provided Sunrun with a Medical Marijuana Program Registry Identification Card and associated documents as proof that his marijuana use was legal.

Plaintiff alleged that on December 21, 2018, Sara Delachapelle, Sunrun's recruitment director, sent him an email advising him that an alert has arisen on his background check and that Sunrun would be doing an Individual Assessment on the report. He claims that approximately three minutes later, Ms. Delachapelle told over the telephone that Sunrun was rescinding its job offer because he tested positive for marijuana.

Plaintiff thereafter commenced this disability discrimination action alleging causes of action under the New York State Executive Law § 296 and the New York City Administrative Code §§ 8-502[a] and 8-107[13]. The gist of all three causes of action is that the job offer was rescinded because of his disabilities.

Defendant maintains that even though there is a statutory provision under State law (New York State Public Health Law § 3369[2]) that provides that the possession of a medical marijuana card constitutes a "disability", since the plaintiff made its decision to rescind the job offer before it became aware of plaintiff's status as a medical marihuana user, plaintiff's claims under State law must be dismissed.

Defendant further contends that under the New York City Administrative Code § 8-

502[a], the possession of a medical marijuana card does not constitute a "disability" and since plaintiff has not alleged that Sunrun failed to hire him on the basis of any other purportedly qualifying "disability", plaintiff's claims under the Administrative Code of the City of New York must also be dismissed.

That branch of defendant's motion to dismiss the cause of action for disability discrimination under Executive Law § 296 is granted. On a motion to dismiss a pleading for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading must be liberally construed, the factual allegations must be deemed true, and the pleading party must be accorded the benefit of every possible inference (*see Leon v. Martinez,* 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Kopelowitz & Co., Inc. v. Mann,* 83 A.D.3d 793, 797, 921 N.Y.S.2d 108; *Panish v. Panish,* 24 A.D.3d 642, 643, 808 N.Y.S.2d 325). Bare legal conclusions, however, are not presumed to be true and are not accorded every favorable inference (*see McKenzie v. Meridian Capital Grp., LLC*, 35 A.D.3d 676, 676, 829 N.Y.S.2d 129, 130; *Morris v. Morris,* 306 A.D.2d 449, 451, 763 N.Y.S.2d 622; *Doria v. Masucci,* 230 A.D.2d 764, 765, 646 N.Y.S.2d 363).

A complaint states a prima facie case of disability discrimination under Executive Law § 296 if the individual suffers from a disability and the disability engendered the behavior for which he or she was discriminated against in the terms, conditions, or privileges of his or her employment (*see Matter of McEniry v. Landi,* 84 N.Y.2d 554, 558, 620 N.Y.S.2d 328, 644 N.E.2d 1019; *McKenzie v. Meridian Capital Group, LLC,* 35 A.D.3d 676, 677, 829 N.Y.S.2d 129; *Thide v. New York State Dept. of Transp.,* 27 A.D.3d 452, 453, 811 N.Y.S.2d 418). The term "disability", however, is limited to disabilities

which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job held (*see* Executive Law § 292[21]; *McKenzie v. Meridian Capital Group, LLC,* 35 A.D.3d at 677, 829 N.Y.S.2d 129; *Umansky v. Masterpiece Intl.,* 276 A.D.2d 691, 692, 714 N.Y.S.2d 735). Here, the complaint does not set forth any factual allegations sufficient to show that, upon the provision of reasonable accommodations, the plaintiff could perform the essential functions of the job for which he was hired despite his disability (*see Staskowski v. Nassau Cmty. Coll.*, 53 A.D.3d 611, 611, 862 N.Y.S.2d 544, 545–46; *McKenzie v. Meridian Capital Group, LLC,* 35 A.D.3d at 677, 829 N.Y.S.2d 129; *Sotomayor v. Kaufman, Malchman, Kirby & Squire,* 252 A.D.2d 554, 554, 675 N.Y.S.2d 894). Indeed, the complaint does not even state what his job would have entailed.

That branch of defendant's motion to dismiss the cause of action for disability discrimination under the New York City Administrative Code is denied. Unlike the definition of "disability" contained in Executive Law § 296, the definition of "disability" under the Administrative Code does not include "reasonable accommodation" and defines "disability" solely in terms of impairments" (*Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824, 834–35, 11 N.E.3d 159, 167, *citing Romanello,* 22 N.Y.3d at 885, 976 N.Y.S.2d 426, 998 N.E.2d 1050; Administrative Code of City of N.Y. § 8–102[16]). The Administrative Code simply forbids employment discrimination against physically and mentally impaired individuals and allows employers to raise as an affirmative defense of the inability of a disabled employee to "with reasonable accommodation, satisfy the essential requisites of the[ir] job [s]" (*id.*, Administrative Code of City of N.Y. §

8–107[15][b]). Thus, unlike the Executive Law, the Administrative Code places the burden on the employer to show the unavailability of any safety and reasonable accommodation and to show that any proposed accommodation would place an undue hardship on its business (*id., see also see Romanello,* 22 N.Y.3d at 885, 976 N.Y.S.2d 426, 998 N.E.2d 1050; *Phillips,* 66 A.D.3d at 183, 884 N.Y.S.2d 369).

Applying these principles, the complaint sufficiently states a cause of action for disability discrimination under the Administrative Code. To state a cause of action of employment discrimination due to a disability under the New York City Administrative Code § 8–107, a plaintiff must simply allege that he or she suffers from a disability and that the disability engendered the behavior for which he was discriminated against in the terms, conditions, or privileges of his or her employment (*Ruane–Wilkens v. Board of Educ. of City of NY,* 56 A.D.3d 648, 649, 868 N.Y.S.2d 112; *Staskowski v. Nassau Community Coll,* 53 A.D.3d 611, 862 N.Y.S.2d 544). The complaint clearly makes out a claim for disability discrimination under the Administrative Code § 8–107.

While the City of New York may not recognize the possession of a medical marijuana card as a disability, the complaint does not simply allege that plaintiff's disability arose from his possession of a medical marijuana card. Plaintiff alleged in his complaint that he was discriminated against because of his disability which he described as "chronic pain and chronic knee pain and possession of a Medical Marijuana Program Registry Identification Card (¶ 1). In ¶¶ 8-10, he alleged that the conditions which cause his pain are "congenial bilateral dislocated patellas, patella alta, hypoplastic patella and a destro convex scliotic curvature."

In light of the above, the Court need not reach the issue of whether plaintiff's possession of a medical marijuana care in and of itself is or can be considered a disability under the Administrative Code.

Accordingly, it is hereby

ORDERED that defendant's motion is **GRANTED** solely to the extent that the cause of action in the complaint under Executive Law § 296 is dismissed for failure to state a cause of action.

This constitutes the decision and order of the Court.

Dated: February 26, 2020

PETER P. SWEENEY, J.S.C.

Hon. Peter P. Sweeney, J.S.C.

KINGS COUNTY CLERK
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