Hutchinson v New York City Tr. Auth.
2020 NY Slip Op 32768(U)
August 20, 2020
Supreme Court, New York County
Docket Number: 160286/2019
Judge: Suzanne J. Adams

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SUZANNE J. ADAMS PART IAS MOTION 21
Justice

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KISHA HUTCHINSON

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

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INDEX NO. 160286/2019

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for DISMISS

Petitioner in this matter, employed as a train conductor for respondent New York City Transit Authority ("NYCTA"), became pregnant and was due in November 2019. Petitioner maintains that prior to her due date, she requested NYCTA to provide her with a reasonable work accommodation in accordance with her obstetrician's restrictions, but was not offered same. Thereafter, petitioner filed the Article 78 Petition dated October 22, 2019, alleging NYCTA violated New York City Human Rights Law § 8-1-7(11)(a) and New York State Human Rights Law § 296(16) regarding employers' obligations to provide pregnant employees with reasonable accommodations. Petitioner filed the Amended Petition dated November 6, 2019, to include class claims on behalf of other similarly situated employees.

NYCTA now moves pursuant to CPLR 3211(a) to dismiss petitioner's First and Second Causes of Action insofar as they assert class action claims, in light of a first-filed class action litigation pending between the parties in Supreme Court, New York County; pursuant to CPLR 3211(a) and § 7801 *et seq.* to dismiss the Amended Petition for failure to state a claim and

improperly seeking Article 78 relief; or alternatively to consolidate the First and Second Causes of Action with the first-filed class action litigation, pursuant to CPLR § 602. Petitioner opposes the motion and cross-moves pursuant to CPLR § 103(c) to convert the Article 78 action to a plenary action and to certify as a class NYCTA employees who have needed or may need an accommodation because of pregnancy, naming petitioner as the class representative. For the reasons discussed below, NYCTA's motion is granted to the extent that petitioner's class action claims are dismissed, and petitioner's cross-motion is granted to the extent that the Article 78 proceeding is converted to a plenary action on behalf of petitioner, individually, and the remainders of the motion and cross-motion are denied.

Cross-Motion to Convert to Plenary Action and Certify Class

Because the decision on the cross-motion to a large extent moots the relief sought in NYCTA's motion, the cross-motion is addressed first. CPLR § 103(c) provides, in pertinent part, that "a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution." Petitioner seeks to convert her action from an Article 78 proceeding to a plenary action. The First and Second Causes of Action in the Amended Petition, as they pertain to petitioner individually, allege that NYCTA did not provide reasonable accommodations for petitioner during her pregnancy in violation of city and state human rights laws, resulting in risk to her health and her child's, as well as lost wages and benefits. These are "colorable claims" and as such should be allowed to proceed against NYCTA in a plenary action. *Goldman v. White Plains Center for Nursing Care, LLC*, 9 Misc. 3d 977, 982 (Sup. Ct., N.Y. Cty. 2005); *see also First National City Bank v. City of New York Finance Administration*, 36 N.Y.2d 87, 94 (1975).

However, petitioner fails to establish that the claims set forth in the Amended Petition are properly asserted on behalf of a class, and that class certification is warranted. CPLR § 901(a) sets forth five prerequisites for maintaining a class action lawsuit:

> 1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
>
> 2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
>
> 3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> 4. the representative parties will fairly and adequately protect the interests of the class; and
>
> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

"These factors are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority." *City of New York v. Maul*, 14 N.Y.3d 499, 508 (2010). All of these prerequisites must be met, and the burden of proof with respect to establishing them rests with the proponent. *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 188, 191 (1st Dep't 1998). These statutory requirements must be supported "by competent evidence in admissible form." *Feder v. Staten Island Hospital*, 304 A.D.2d 470, 471(1st Dep't 2003). Ultimately, it is within the trial court's sound discretion to determine whether a lawsuit qualifies as a class action under the statute. *Maul*, 14 N.Y.3d at 509.

Here, petitioner fails to meet her burden of establishing that her claims qualify as a class action and should be certified as such. Petitioner does not establish numerosity; in support of this requirement she only proffers the Affidavit of Eric Loegel, Vice President of Rapid Transit Operations for Transport Workers Union, Local 100 (Exhibit 2 to the Affirmation of Laine Alida

Armstrong in Opposition to Respondent's Motion and in Support of Petitioner's Motion), who states (¶ 6) that NYCTA employs 1,191 women conductors with an average age of 44 years. There is no way to determine a reasonable prospective class number from this sole piece of information without using pure speculation to ascertain the number of women who are actually of child-bearing age, and who then become pregnant and, further, will necessarily require an accommodation as a result. Such speculation is not a basis for a finding of numerosity. *David v. Winthrop-University Hospital Association*, 2015 WL 13767980 at *3 (Sup. Ct., Queens Cty. Jan. 26, 2015). Likewise, petitioner does not establish commonality or typicality, because she provides "no competent evidence in admissible form" in support of her contentions, only speculative assumptions. There is no evidence before the court suggesting that other pregnant NYCTA conductors required accommodations that were not given, or required accommodations identical to petitioner's, or that any alleged failure of NYCTA to provide accommodations was a discriminatory act rather than the result of neutral factors, such as a conductor's seniority or qualifications. Finally, it is axiomatic that given the absence of numerosity, commonality and typicality, petitioner also does not demonstrate adequacy of representation and superiority. Accordingly, petitioner's Article 78 action insofar as it asserts individual claims in the First and Second Causes of Action shall be converted to a plenary action, but there is no basis for certification as a class action and the claims as asserted on behalf of a class are dismissed.

Motion to Dismiss or Stay, or Alternatively to Consolidate

NYCTA's motion seeks dismissal of the Amended Petition pursuant to CPLR 3211(a)(4) on the grounds that to the extent it asserts class action claims, such claims are identical to those of an earlier filed class action suit pending in Supreme Court, New York County. NYCTA moves in the alternative to have the instant action consolidated with the prior pending action. As

discussed above, petitioner's Article 78 proceeding is converted to a plenary action, but only insofar as it pertains to petitioner's claims as an individual, and the class action claims are dismissed. Thus, in light of the decision on petitioner's cross-motion, NYCTA's motion to dismiss the class action claims is granted, albeit on different grounds than those argued, and the remainder of its motion is denied as moot.

Accordingly, it is hereby

ORDERED that NYCTA's motion to dismiss, or alternatively to consolidate, is granted to the extent that petitioner's class action claims are dismissed, and the remainder of NYCTA's motion is denied; and it is further

ORDERED that petitioner's cross-motion to convert the Article 78 proceeding to a plenary action and certify a class action is granted to the extent that the Article 78 proceeding is converted to a plenary action only insofar as the claims asserted on behalf petitioner individually, and that the class action claims are dismissed and the remainder of petitioner's cross-motion is denied; and it is further

ORDERED that the action shall bear the following caption:

KISHA HUTCHINSON, Index. No. 160286/2019

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

This constitutes the decision and order of the court

8/20/2020
DATE

SUZANNE J. ADAMS, J.S.C.

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