Whyte v Whole Foods Mkt. Group, Inc.
2022 NY Slip Op 33396(U)
September 28, 2022
Supreme Court, Kings County
Docket Number: Index No. 522616/2020
Judge: Ingrid Joseph
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At an I.A.S. Term, Part 83 of the Supreme Court of the State of New York, held at the County of Kings, 360 Adams Street, Brooklyn, New York, on the 28th day of September 2022.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

COLLIN WHYTE,

Plaintiff,

Index No.: 522616/2020

-against-

DECISION AND ORDER

WHOLE FOODS MARKET GROUP, INC., ELITE INVESTIGATIONS LTD, "JANE DOE" and "JOHN DOE" (Said names being fictitious as true names are unknown to plaintiff),

Defendants.

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The following e-filed papers considered herein:	NYSCEF E-filed doc
Notice of Motion/Affirmation/Exhibits.....	76 - 83
Opposition	89 - 95
Reply.....	96

In this matter, Defendants, Whole Foods Market Group, Inc. ("Whole Foods") and Elite Investigations LTD ("Elite")(referred to collectively as, "Defendants") move (Motion Sequence 5) pursuant to CPLR § 3211 (a)(7) to dismiss Plaintiff's, Collin Whyte ("Plaintiff"), First Cause of Action in the Amended Verified Complaint.

Plaintiff commenced this matter on November 13, 2020 to recover damages for deprivation of his civil rights and personal injuries he sustained on April 29, 2020, when Whole Foods' agents, a security guard and manager, allegedly assaulted, battered, and refused plaintiff entry into the Whole Foods store for failure to wear a mask.

In the First Cause of Action, consisting of paragraphs 33 through 38, Plaintiff alleges that defendants, Jane Doe, John Doe, Whole Foods, and Elite Investigations, LTD ("Elite"), violated provisions of Executive Orders 202.17 and 202.18 by failing to allow Plaintiff to enter Whole Foods without a mask, and banned Plaintiff from the store, after being informed that Plaintiff had a medical condition that excused him from the mask mandate established in the Executive Orders.

Defendants argue that the subject Executive Orders provided, in pertinent part, that individuals over the age of two who are able to medically tolerate a face-covering were required to wear one in public places where individuals are unable to be socially distant. Defendants point out that Plaintiff concedes he was denied entry into Whole Foods for failure to wear a face mask during the COVID-19 pandemic. Defendants maintain that nothing in the language of the Executive Orders provides Plaintiff with any remedy, or a private right of action, for an alleged violation of the face-covering mandate.

Defendants contend that the rules of statutory construction also apply to the interpretation of Executive Orders. Citing the Court of Appeals decision in *Mar G. v Sabol*, 93 NY2d 710 [1999], Defendants point out that a statutory command, as a general matter, does not necessarily include a right of private enforcement by means of tort litigation. Defendants maintain that the Executive Orders at issue do not carry with them a private right of action. Defendants rely upon the plain language of the Executive Orders, as well as a two-part inquiry concerning then Governor of the State of New York, Andrew Cuomo's, objective in issuing such order. Defendants argue that a private right

of action is not explicitly provided for in the Executive Order, nor would a private right of action promote Governor Cuomo's objective in issuing such orders.

Plaintiff contends that the Defendants' basis for dismissal of his First Cause of Action, for failure to state a case of action, is identical to the arguments raised in support of a 12(b)(6) motion to dismiss in the *Gerard Thomchick v Giant Eagle, Inc.*, 2:20-v-764 [USDC, Western District of Pennsylvania]. Plaintiff argues that Thomchick also sought to recover damages against a defendant-grocery store, Giant Eagle, for precluding Thomchick entry into its store for failure to wear a face covering in accordance with a mask mandate issued by Pennsylvania's Secretary of Health. Plaintiff argues that this court, as did the Federal District Court in *Giant Eagle*, should deny the Defendants' motion to dismiss. Additionally, Plaintiff rejects the Defendants' interpretation of the subject Executive Orders and instead, proposes that the face covering mandate also protected individuals who could not medically tolerate a face covering.

In addressing the Defendants' application pursuant to CPLR § 3211(a)(7), it is well understood that the court must afford Plaintiff's pleading a liberal construction, accept the facts alleged in the complaint as true, accord Plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Goshen v. Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]; *Leon v. Martinez*, 84 NY2d 83, 87 [1994]). The court is limited to "an examination of the pleadings to determine whether they state a cause of action," and the "plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face" (*Dolphine Holdings, Ltd. v Gander & White*

Shipping, Inc., 122 AD3d 901, 902 [2d Dept 2014] *quoting Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]). Stated another way, whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Unlike on a motion for summary judgment, where the court searches the record and assesses the sufficiency of evidence, on a motion to dismiss, the court merely examines the adequacy of the pleadings (*Davis v. Boeheim*, 24 NY3d 262, 268 [2014]). The appropriate test of the sufficiency of a pleading is whether such pleading gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (*V. Groppa Pools, Inc. v. Massello*, 106 AD3d 722, 723 [2d Dept 2013]; *Moore v Johnson*, 147 AD2d 621 [2d Dept 1989]).

In the *Konkur v Utica Academy of Science Charter School*, 38 NY3d 38 [2022], the Court of Appeals addressed whether Labor Law 198-b, which contains no express provision for a private right of action, actually provides a private right of action by implication. The Court explained that "because [the statutory provision in issue] contains no express private right of action, "plaintiffs can seek civil relief in a plenary action based on a violation of the statute 'only if a legislative intent to create such a right of action is fairly implied in the statutory provisions and their legislative history' " (*Konkur v Utica Academy of Science Charter School*, 38 NY3d 38, 40-41 [2022] *citing Cruz v. TD Bank, N.A.*, 22 NY3d 61, 70 [2013], *quoting Carrier v. Salvation Army*, 88 NY2d 298, 302 [1996]). The Court further explained that a three-factor test is utilized to determine

whether the legislative intent favors an implied right, as follows: Firstly, the motion court must assess whether the plaintiff is a member of the class for whose particular benefit the statute was enacted and secondly, whether recognition of a private right of action would promote the legislative purpose. Thirdly, the question of whether creation of such a right would be consistent with the legislative scheme must be addressed (*Konkur*, at 41). (*Ortiz v Ciox Health LLC*, 37 NY3d 353, 360[2021], *quoting Sheehy v. Big Flats Community Day*, 73 NY2d 629, 633 [1989]). The Court reiterated that "all three factors must be satisfied before an implied private right of action will be recognized" (*KonKur*, at 41 *quoting Ortiz*, 37 NY3d at 360 *and Haar v. Nationwide Mut. Fire Ins. Co.*, 34 NY3d 224, 229 [2019]).

Here, Plaintiff commenced a plenary action to recover damages based upon Whole Foods' alleged violation of Executive Orders 202.17 and 202.18, issued on April 15, 2020 and April 16, 2020, respectively. Order 202.17 required "any individual who is over age two and able to medically tolerate a face-covering shall be required to cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance." Order 202.18, containing essentially the same language, applied specifically to persons utilizing public or private transportation carriers or other for-hire vehicles. Although the language of the Executive Orders specifically address public places and public/private transportation, the face covering mandate was applied in public and private places.

The issue is whether the Executive Orders provide a private right of action for an individual, such as Plaintiff, who was denied entry into a privately-run food market,

despite the exception carved out for individuals who cannot medically tolerate a face covering. Since the COVID-19 virus was an issue for all individuals in densely populated, New York City, Governor Cuomo took aggressive action to balance the rights of individuals' who could not medically tolerate wearing a mask, with the interest of implementing public health and safety measures to protect the general public. Thus, the stated purpose was to reduce the community-wide transmission and spread of COVID-19. Plaintiff, an individual resident of the City of New York and member of the larger, New York City-community, is one of the class for whose particular benefit the Executive Orders were issued. The Executive Orders also contemplated individuals who cannot medically tolerate a face covering, by affirmatively dispensing with the requirement that such persons wear a face covering.

The subject Executive Orders do not include a remedy for individual members of the public who contend the mandate was not adhered to by a private or public organization. Additionally, Plaintiff proffered no legal principle or line of reasoning that would support his assertion that a private right of action promotes, or advances the stated purpose of preventing the spread of COVID-19. There is no showing that a private right of action is consistent with the scheme of Executive Orders that were issued contemporaneous with the onset of the COVID-19 pandemic. Furthermore, contrary to Plaintiff's contentions, the *Gerard Thomchick v Giant Eagle, Inc.*, US Dist Ct, WD PA, 2:20-cv-00764, May 27, 2020[motion to dismiss denied on procedural grounds] case is neither analogous nor persuasive. In that case, the Plaintiff sought damages based upon the Civil Rights Law and American with Disabilities Act, both of with explicitly provide

individuals with a private right of action to seek damages from individuals and entities that do not comply.

Based upon the foregoing, the court finds that the factors for determining whether a statute, or in this case, an Executive Order, creates an implied right of action have not been satisfied.

Accordingly, Plaintiff's First Cause of Action is dismissed pursuant to CPLR § 3211(a)(7).

This constitutes the decision and order of the court.

ENTER

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice