| **Mbanefo v C&C Apt. Mgt., LLC** |
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| 2024 NY Slip Op 32097(U) |
| June 20, 2024 |
| Supreme Court, New York County |
| Docket Number: Index No. 152500/2020 |
| Judge: Shlomo S. Hagler |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. SHLOMO S. HAGLER** **PART** **17**

***Justice***

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JOSEPH MBANEFO

Plaintiff,

- v -

C&C APARTMENT MANAGEMENT, LLC,

Defendant.

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**INDEX NO.** 152500/2020

**MOTION DATE** 07/29/2022

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for JUDGMENT - SUMMARY.

In this action asserting claims for perceived disability discrimination under the New York State Human Rights Law (State HRL) (Executive Law § 296) and the New York City Human Rights Law (City HRL) (Administrative Code of City of NY § 8-107), defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. The motion is denied.

## BACKGROUND

Defendant is a property management firm with over 500 employees managing the day-to-day operations of roughly 350 multi-family properties throughout the United States, including 19 buildings in Manhattan (Plaintiff's Opposition to Defendant's Statement of Material Facts and Plaintiff's Incorporated Responses, at ¶ 1 [NYSCEF Doc. No. 38]). In early November 2018, defendant needed to fill three residential concierge positions, a role that includes greeting residents and guests, receiving packages, distributing mail and packages, handling a large volume of inquiries from tenants and guests, and proving general assistance to community residents (*id.* at ¶¶ 3, 4).

Defendant's Regional Security Manager, Mitchell Britton, interviewed three candidates for the openings, including plaintiff (*id.* at ¶ 5). Britton then sent approval for all three candidates to defendant's Director of Human Resources (HR), Antionette Gardiner (*id.* at ¶ 6). Plaintiff passed a background check. He received an offer letter and went to Gardiner's office to sign pre-hire paperwork (*id.* at ¶ 11). Gardiner gave plaintiff new-hire materials, including an Employee Handbook (*id.*).

Plaintiff's start date was set for December 17, 2018 (*id.* at ¶ 15). On his way to work that day, he fell down the stairs in a subway station and was taken to the hospital by ambulance (*id.* at ¶ 16). While in transit to the hospital, someone in the ambulance called Britton, plaintiff's immediate supervisor, to explain the situation and to inform him that plaintiff would not be reporting for work that day (*id.* at ¶ 17). According to plaintiff, the person in the ambulance was a paramedic who also told Britton that they needed to take plaintiff to the hospital and were concerned given his stroke history (*id.* at ¶ 18).

Plaintiff was discharged from the hospital that same day. His discharge papers state that he was diagnosed with a knee contusion (*id.* at ¶ 19).

The next day, December 18, 2018, plaintiff provided a copy of his discharge papers to Britton (*id.* at ¶ 22). According to plaintiff, Britton asked him whether he was able to stand and work for long periods of time (*id.* at ¶ 21). Plaintiff responded that he was able to do so (*id.* at ¶ 29). It is undisputed that plaintiff was fit for work, had no disability that would have prevented him from working, and never asked for any reasonable accommodation for his knee injury (*id.* at ¶ 20).

According to plaintiff, Britton told him that in order to begin work, he needed to provide a medical clearance form reflecting that he was fit for work (*id.* at ¶¶ 21, 23). Plaintiff alleges

that he went directly to the hospital, obtained written medical clearance, and delivered the clearance to Britton that same day (December 18, 2018) (*id.* at ¶ 23).

Plaintiff alleges that he thereafter contacted Britton several times to inquire about reporting to work, but that Britton continually told plaintiff that he was waiting for clearance from HR. According to plaintiff, Britton stopped returning his calls and on plaintiff's last attempt to speak to Britton in person, Britton ran away (*id.* at ¶ 24). Plaintiff then attempted to speak to Gardiner in person by visiting her office. Plaintiff alleges that he was turned away several times (*id.* at ¶¶ 25, 27, 28).

On March 6, 2020, plaintiff commenced the instant action seeking damages under the State HRL (first cause of action) and the City HRL (second cause of action), on the ground that defendant terminated his employment due to a perceived disability. Defendant now moves for summary judgment dismissing the complaint.

**DISCUSSION**

"On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party, and summary judgment must be denied where the moving party fails to demonstrate the absence of any material issues of fact" (*Scurry v New York City Hous. Auth.*, 39 NY3d 443, 457 [2023]). If the moving party makes this showing, "the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024] [internal quotation marks and citations omitted]). In the context of a disability discrimination claim, an employer moving for summary judgment dismissing an employee's claims under both the State HRL and the City HRL has the burden of

showing that the employee's evidence and allegations present no triable issues of fact (*see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]).

In moving for summary judgment, defendant argues that plaintiff cannot establish a disability discrimination claim under either the State or City HRL because by his own admission he is not disabled. Therefore, defendant contends, a disability could not have been a motivating factor for any alleged adverse employment decision.

Defendant further asserts that, in any event, no adverse employment decisions were made. Rather, plaintiff abandoned his job. Defendant maintains that contrary to plaintiff's allegations, neither Gardiner nor Britton heard from plaintiff after December 20, 2018, and plaintiff never actually provided them with a document reflecting that he was fit for work. Rather, plaintiff fell out of contact.

Defendant argues that the Employee Handbook provided to plaintiff states that an "[u]nexplained failure to return to work after an approved leave of absence on the date specified may be considered a voluntary resignation" and that an "[u]nexplained failure to report to work and call in for three (3) consecutive days unless incapable of doing so may be considered a voluntary resignation due to job abandonment" (Employee Handbook at 24 [NYSCEF Doc. No. 30]). According to defendant, plaintiff's inability to report to work on his first day was an approved leave of absence and while plaintiff was told he needed a medical clearance letter in order to begin work, he thereafter never provided defendant with the necessary documentation. Plaintiff stopped communicating with Britton and thus, in effect, abandoned his job.

The State HRL provides that "[i]t shall be an unlawful discriminatory practice … [f]or an employer … because of . . . disability . . . of any individual, to refuse to hire or employ or to bar

or to discharge from employment such individual" (Executive Law § 296 [1] [a]). The State HRL defines the term "disability" as follows:

> "(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) *a condition regarded by others as such an impairment,* provided, however, that in all provisions of this article dealing with employment, the term shall be 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 or occupation sought or held"

(Executive Law § 292 [21] [emphasis added]). This definition is considered "broad enough to embrace persons who, like plaintiff, contend they are not disabled but whom the potential employer perceives (wrongfully) to be disabled" (*Doe v Roe, Inc.*, 160 AD2d 255, 256 [1st Dept 1990]; *see also Ashker v International Bus. Machs. Corp.*, 168 AD2d 724, 726 [3d Dept 1990] ["The statutory language is sufficiently broad, and the legislative history sufficiently supportive of an interpretation (*see*, Executive Dept mem, 1983 McKinney's Session Laws of NY, at 2705-2706), that nondisabled individuals like plaintiff, whom an employer wrongfully perceives as impaired, come within its reach"]).

The City HRL defines the term "disability" as "any physical, medical, mental or psychological impairment, or a history or record of such impairment" (Administrative Code of City of NY § 8-102) and makes it unlawful for an employer to discriminate against a person on the basis of an "actual *or perceived* . . . disability" (Administrative Code of City of NY § 8-107 [1] [a] [emphasis added]). Thus, to the extent defendant is arguing that plaintiff must prove that he was actually disabled in order to succeed on his State or City HRL claim, this contention is without merit. Plaintiff need only establish that defendant discriminated against him based upon a perceived impairment.

In this regard, plaintiff asserts that after he fell down the subway stairs, defendant believed he was impaired because of the fall and/or because of becoming aware that he had a stroke history. Defendant argues that the court may not consider this theory because it was not pleaded in the complaint and is also based upon hearsay.

Defendant correctly argues that a "court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint" (*Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012] [internal quotation marks and citations omitted]). Plaintiff's claim, however, is not a new theory of recovery different from that asserted in the complaint. Rather, it expounds upon the theory pleaded in the complaint, that defendant discriminated against plaintiff because of a "perceived disability" (Complaint at ¶ 27, NYSCEF Doc. No. 1). Thus, plaintiff is not setting forth a distinct or conflicting theory of recovery from that alleged in the complaint (*cf. Richardson v Proctor & Gamble Co.*, 209 AD3d 455, 456 [1st Dept 2022] [plaintiff's deposition testimony was insufficient to raise any issues of fact, because it improperly raised a new theory of liability for the first time in opposition to summary judgment and offered a distinct and conflicting theory of recovery]). While the complaint does not allege a specific type of perceived disability, plaintiff testified during his deposition that "everything changed" after his accident when the paramedic told Britton that plaintiff fell and that he was a "stroke patient" (Plaintiff's EBT at 114, 65 [NYSCEF Doc. No. 31]). Plaintiff testified that defendant discriminated against him because defendant misperceived him as being "not well to work" (*id.* at 114-115; *see Walker v Jamaica Hosp. Med. Ctr.*, 208 AD3d 714, 716-717 [2d Dept 2022] ["Although the plaintiffs' theory . . . was not specifically alleged in the complaint or bill of particulars, this theory was referred to by the plaintiffs' counsel [during depositions], and thus, was appropriately raised in

opposition to [defendant's] motion" for summary judgment]). As such, this theory is appropriately raised by plaintiff in opposition to defendant's motion.

Further, plaintiff's deposition testimony in this regard is sufficient to raise an issue of fact. Britton testified during his deposition that he remembered receiving a phone call on plaintiff's first day of work, but that the phone call was not from plaintiff. Britton testified that the call "was from an innocent . . . bystander" saying: "This person asked me to call you because he got into an accident" (Britton EBT at 28 [NYSCEF Doc. No. 27]). Plaintiff's counsel questioned Britton as to whether this was "all the information provided?" (*id.*). Britton responded "Yes" (*id.*). Thus, the parties' deposition testimony about the information received by Britton on the day of the accident conflicted, raising an issue of credibility and a factual question as to whether Britton was in fact told by a paramedic on route to the hospital that plaintiff's fall raised concern given plaintiff's stroke history (*see Handelsman v Llewellyn*, 208 AD3d 1, 8 [1st Dept 2022] ["[i]t is not the court's function on a motion for summary judgment to assess credibility"]).

Defendant further contends that the deposition testimony regarding plaintiff's stroke history may not be considered because it constitutes inadmissible hearsay. Contrary to defendant's contention, plaintiff's testimony that the paramedic told Britton that plaintiff was a "stroke patient" is not inadmissible hearsay, as it is not offered for the truth of the matter asserted. Rather, it is offered as evidence that the statement was made (*see DeSario v SL Green Mgt. LLC*, 105 AD3d 421, 422 [1st Dept 2013]).

Lastly, defendant argues that plaintiff cannot, in any event, establish that defendant made an adverse employment decision on the basis of a perceived disability because plaintiff was never terminated. Plaintiff abandoned his job. Defendant contends that plaintiff's assertion that

he provided Britton with a medical clearance form is unfounded. Both Britton and Gardiner testified that they never received such paperwork and that defendant fell out of contact. Defendant points out that plaintiff never sent an email to Gardiner about returning to work even though he had done so during the pre-hiring process. Instead, plaintiff admittedly showed up in person and was not allowed to enter the building because he did not have an appointment. Rather than making an appointment via e-mail as he had done in the past, plaintiff continued to show up unannounced and was, therefore, turned away. Defendant claims that it therefore had no alternative but to assume that plaintiff would not report back to work and to move forward with filling the job with a different candidate. Defendant asserts that it had no obligation to keep the position open for plaintiff or to wait indefinitely for him to provide the requested medical clearance.

Plaintiff's testimony, however, differs in relevant respects. Plaintiff testified that on December 18, 2018, Britton asked him if he was "able to stand, to do work for a long period of time" and requested a medical clearance note (Plaintiff's EBT at 117 [NYSCEF Doc. No. 31]). Plaintiff testified that he gave a written medical clearance form to Britton that same day and that Britton told him that he sent the document to HR. Thereafter, Britton repeatedly informed plaintiff that he was waiting for HR to clear plaintiff before he could return to work. Plaintiff testified: "[Britton] started to avoid me. He started to avoid my phone calls. When I [went] there to see him, he would try to dodge me and run away" (*id.* at 109). Plaintiff became concerned and went to HR in person but was not permitted by security to go upstairs "because they said I don't have an appointment" (*id.* at 88). Plaintiff testified that he tried to call, but "nobody called back, so I went back there" (*id.* at 89). He tried to contact HR by phone, but "nobody picked up" (*id.* at 90). On one occasion, he was told that Gardiner no longer worked

there. Plaintiff testified that he went to the HR office at least three times and that security told him: "if you don't leave here, we're going to call the cops on you" (*id.*). Plaintiff's testimony presents credibility and fact-finding determinations which cannot be resolved on a motion for summary judgment.

Thus, defendant's motion for summary judgment is denied.

**CONCLUSION**

On the basis of the foregoing, it is

**ORDERED** that defendant's motion for summary judgment dismissing the complaint is denied.

June 20, 2024
DATE

SHLOMO S. HAGLER, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
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| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
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