Becerril v City of New York Dept. of Health and Mental Hygiene
2012 NY Slip Op 31210(U)
May 3, 2012
Sup Ct, New York County
Docket Number: 402611/08
Judge: Barbara Jaffe
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SCANNED ON 5/8/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE, J.S.C. — Justice

PART 5

Index Number : 402611/2008
BECERRIL, ADRIANNA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____

The following papers, numbered 1 to ____, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	No(s). 1, 2, 3
Answering Affidavits — Exhibits	No(s). 4, 5
Replying Affidavits	No(s). 6

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____
FOR THE FOLLOWING REASON(S): ____

RECEIVED
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
MAY 08 2012
NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/3/12
MAY 03 2012

____, J.S.C.
BARBARA JAFFE
J.S.C.

1. CHECK ONE: .... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: ....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

---x

ADRIANNA BECERRIL,

Plaintiff,

-against-

CITY OF NEW YORK DEPARTMENT OF HEALTH AND MENTAL HYGIENE and THE CITY OF NEW YORK,

Defendants.

---x

Index No. 402611/08

Motion Date: 1/10/12
Motion Seq. No.: 001
Motion Cal. No.: 18

DECISION AND ORDER

FILED

MAY 08 2012

NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, J.S.C.:

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By second amended notice of motion dated September 16, 2011, defendants move pursuant to CPLR 3212 for an order dismissing the complaint. Plaintiff opposes.

I. BACKGROUND

In the spring of 2007, plaintiff was offered a job with defendant City of New York Department of Health and Mental Hygiene (DOH) Bureau of Child Care (Bureau) as an Early Childhood Education Consultant (ECEC). (Affirmation of William J. Sipser, Esq., in Opposition, dated Nov. 11, 2011 [Sipser Opp. Aff.], Exh. C). The "Justification Document" for the position reflects that plaintiff would be responsible for, *inter alia*, "on site assessment . . . [and] surveillance" of daycare centers and that she had "10 years of experience in [ ] Early Childhood Education [and] . . . is very knowledgeable, bi-lingual and skillful in her field . . . ." (*Id.*).

On July 31, 2007, Linda Armstrong, a DOH administrator responsible for "coordinating

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recruitment and hiring for the Bureau," called plaintiff to inform her that she had been approved for hiring, that her first day would be September 4, 2007, and that she should appear at 125 Worth Street on that day. (Affirmation of Jamie M. Zinaman, ACC, dated Aug. 15, 2011 [Zinaman Aff.], Exh. F).

On September 4, 2007, plaintiff went to 125 Wall Street rather than 125 Worth Street, and returned to the Bronx after she unsuccessfully attempted to contact the Bureau. (*Id.*, Exh. C). Eventually, she spoke with James McCormack, a DOH administrator, explaining her confusion as to DOH's address. (*Id.*). Her start date was postponed to September 5. (*Id.*).

On September 5, plaintiff again failed to appear at 125 Worth Street, and the employee to whom she was to report informed McCormack, Armstrong, and Diana Lamont, another DOH administrator. (Sipser Opp. Aff., Exh. D). Armstrong responded via email that plaintiff had called her at 11:25 a.m. and told her that she was ill and that she would report to work with a doctor's note the following day. (*Id.*, Exh. E).

Later that day, Lamont responded via email, stating that she had "reservations" with plantiff due to her repeated absences and failure to call before 11:30 a.m. (*Id.*). Frank Cresciullo, another DOH administrator, replied that he did not want to hire her and asked Armstrong to "pull back the offer." (*Id.*). Armstrong then clarified her earlier email, stating that plaintiff was five months pregnant and had gone to the hospital after experiencing pains. (*Id.*). McCormack and James Morriss, another DOH administrator, stated that they believed that the Bureau should continue with hiring plaintiff, and Lamont responded that she would prefer to discuss the matter further by telephone. (*Id.*).

The following morning, Elliott Marcus, the DOH administrator with ultimate

decision-making authority, sent the group the following email:

> The candidate missed two consecutive processing dates. She called me after missing the first to say that she went to 125 Wall Street, instead of 125 Worth Street. I suggested she walk over to Worth Street right away but she stated she had already left the area. I then contacted her with Jim McCormack and another processing appointment was made, which she also missed. This is a basd (sic) start and proceeding with her hire will be a mistake. Please begin interviewing for another ECEC.

(*Id.*). Armstrong then called plaintiff and told her that the offer had been rescinded. (Zinaman Aff., Exh. F).

Sometime on or before November 7, 2007, plaintiff wrote a letter to Armstrong stating that she had contacted the United States Equal Employment Opportunity Commission and an attorney, that she remained interested in working for DOH, and that she wanted to ensure that the Bureau's decision remained the same before taking further action. (Sipser Opp. Aff., Exh. I).

By email dated November 8, 2007, copying Marcus, the assistant commissioner for DOH's human resources department asked Armstrong to send her "an outline of the events that are referred to in th[e] letter and any and all information surrounding this employee and [Armstrong's] interaction with her." (*Id.*, Exh. J). Marcus then emailed Armstrong asking that she send him her outline before sending it to human resources, and on November 13, Armstrong did so. (*Id.*). By email dated November 15, 2007, Marcus sent Armstrong a memorandum and instructed her to forward only it to human resources. (*Id.*). The memorandum reflects the course of events leading to the rescission of the offer, and that emails were exchanged, although only Marcus's September 6 email is quoted. (*Id.*, Exh. K).

On or about August 13, 2008, plaintiff commenced the instant action with the filing of a summons and verified complaint, asserting claims for gender and disability discrimination

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pursuant to the New York City Human Rights Law (NYCHRL) (New York City Administrative Code § 8-107[a][1]). (Zinaman Aff., Exh. A). On or about November 21, 2008, defendants joined issue with service of their answer. (*Id.*, Exh. B).

On or about November 25, 2008, plaintiff commenced an action against the East Bronx NAACP Child Development Center (East Bronx) in the federal district court for the Southern District of New York (federal action), asserting gender discrimination claims pursuant to Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the NYCHRL arising from the Center's termination of her employment on September 17, 2007. (*Id.*, Exh. L).

On March 2, 2009, plaintiff was granted a default judgment in the federal action, and by order and judgment dated September 17 and September 28, 2009, respectively, she was awarded front and back pay, pre- and post-judgment interest, compensatory damages, and attorney fees and costs. (*Id.*, Exh. O).

At an examination before trial (EBT) held on July 15, 2010, plaintiff testified that she worked at East Bronx before receiving and accepting DOH's offer, that she returned to work there after DOH rescinded her offer, and that she was fired shortly thereafter. (*Id.*, Exh. C). She explained that she had first spoken with DOH on September 5 after she had left the hospital around 11:00 a.m., discovered that Armstrong had left her a voice mail, and returned her call. (*Id.*).

At an EBT held on January 7, 2011, Lamont testified that she had "reservations" about plaintiff after hearing that she had not appeared at work two days in a row, and she explained that she wanted to discuss plaintiff's situation via telephone rather than email because "it's too much writing . . . , [she] can't keep up with all the other things," and she wanted to know whether they

had reached out to plaintiff, not because she wanted to avoid a paper record of the conversation. (*Id.*, Exh. G). According to her, as McCormack and Morriss were not decision makers, she could not take orders from them as to whether the Bureau should continue with plaintiff's hiring process, and in any event, she did not possess final decision-making authority. (*Id.*).

At an EBT held on February 3, 2011, Marcus testified that he decided to rescind plaintiff's offer even after learning of her pregnancy:

> [b]ecause on two successive days [plaintiff] not only failed to arrive on time for an appointment, she also failed to call as to why she was not able to keep the appointment until much later in the morning. It was a field job, primarily involved going to Child Care services throughout the City. I was concerned that someone that could not find their way to our office, wouldn't be able to find their way to Bronx, Queens, Brooklyn, Manhattan and someone that was not responsible enough to call and say they can not come to work is not someone we can rely on. . . . [T]he fact that she had gone to the hospital with contractions is irrelevant to me.

(*Id.*, Exh. E). He further explained why he did not inquire into the severity of plaintiff's medical problems:

> I would presume there was someone in her life if she couldn't, would make a phone call for her. Certainly what I would have done being a reasonable, responsible person. Particularly if I was interested in having a job and keeping a job. If it was important to me, I would have gotten word through. I can't make it, I'm sick. Had she done that, I wouldn't have cared what the issue, what the illness was. She could have had the sniffles, if she was telling me she was sick, it's not my business.

(*Id.*). He also testified that he had asked to review Armstrong's summary because he reviews "anything that goes out of [his] office" and "wanted to make sure that [his] role was properly and adequately represented," that he ordered her to send only the memorandum to human resources because he believed it "summarized completely the nature of the relationship and exchanges between [plaintiff] and Armstrong," that he thought that human resources was requesting only a summary in asking for "any and all information," and that he would have supplied the emails had

he been asked to do so. (*Id.*). He conceded that "any and all information" could be construed to include the emails. (*Id.*).

By letter dated September 23, 2011, plaintiff's counsel in the federal action informed her that they were unable to collect the judgment. (Sipser Opp. Aff., Exh. O).

II. CONTENTIONS

Defendants deny that plaintiff has established a *prima facie* claim, as her pregnancy compromised her ability to travel and thus rendered her unqualified for the position, pregnancy does not qualify as a disability, and the offer was not rescinded under circumstances giving rise to an inference of discrimination. (Zinaman Aff.). In any event, they claim that her repeated failure to inform them promptly about her inability to come to work constitutes a legitimate, non-discriminatory reason for rescission of her offer. (*Id.*). Moreover, they assert that she is judicially estopped from obtaining damages in the instant action, having been awarded damages for the same time period in her federal case. (*Id.*).

In opposition, plaintiff maintains that her pregnancy constitutes a disability pursuant to the Administrative Code and that she was qualified for the position, relying on the Justification Document. (Sipser Opp. Aff.). She also asserts that defendants' proffered reason for rescission of the offer is pretextual, as Marcus decided to rescind the offer after learning that she was hospitalized and failed to ascertain the severity of her medical problems, Lamont requested a telephone conference after learning of her pregnancy, and Marcus asked to review Armstrong's summary and instructed her to not send human resources the emails. (*Id.*). She denies being judicially estopped from seeking damages from defendants, as her federal case arose from different facts, and in any event, she is unable to collect the judgment. (*Id.*).

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In reply, defendants claim that plaintiff has failed to establish that they rescinded the offer under circumstances from which discrimination may be inferred or that their reason for doing so is pretextual, as Lamont's and Cresciullo's emails demonstrate that they wanted to rescind her offer before discovering she was pregnant. (Defs.' Mem. of Law in Further Support). They also argue that even if she is not judicially estopped, her damages should be reduced to the extent that East Bronx's conduct contributed to her emotional distress. (*Id.*).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

A. NYCHRL

The NYCHRL provides, in pertinent part, that:

> [i]t shall be an unlawful discriminatory practice . . . [f]or an employer . . . because of the actual or perceived gender [or] disability . . . of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

(Admin. Code § 8-107[a][1]). The NYCHRL "shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether

federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed." (Admin. Code § 8-130). Therefore, federal cases "may be used as aids in interpretation only to the extent that the counterpart provisions are viewed 'as a floor below which the [NYCHRL] cannot fall, rather than a ceiling above which the local law cannot rise . . . .'" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 67 [1st Dept 2009]).

In state and federal discrimination cases, a three-step burden-shifting analysis is employed to determine whether plaintiff has established a claim. (*McDonnell Douglas Corp. v Green*, 411 US 792 [1973]; *Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of the AFL-CIO*, 6 NY3d 265, 271 [2006]). First, the plaintiff must establish a *prima facie* claim, requiring that she demonstrate that: (1) she is a member of a protected class; (2) she was qualified to hold her position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. (*Stephenson*, 6 NY3d at 270-71). Second, if a *prima facie* claim is established, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged action. (*Id.*). Third, if the defendant does so, the burden shifts back to the plaintiff to demonstrate that the reason is pretextual. (*Id.*).

When a defendant moves for summary judgment on a claim made pursuant to the NYCHRL and "offer[s] evidence in admissible form of one or more non-discriminatory motivations for its actions, a court should ordinarily avoid the unnecessary and sometimes confusing effort of going back to question whether a *prima facie* case has been made out in the first place." (*Bennett v Health Mgmt. Sys., Inc.*, 92 AD3d 29, 39-40 [1st Dept 2011]). Instead, the court should next determine whether the plaintiff has offered "some evidence that at least one of

the reasons proffered by the defendant is false, misleading, or incomplete . . . ." (*Id.*).

> A plaintiff's response to a defendant's showing of non-discriminatory reasons for its actions can take a variety of forms. In some cases, the plaintiff may present evidence of pretext and independent evidence of the existence of an improper discriminatory motive. In other cases, the plaintiff may leave unchallenged one or more of the defendant's proffered reasons for its actions, and may instead seek only to show that discrimination was just one of the motivations for the conduct. In addition, evidence of an unlawful motive in the mixed motive context need not be direct, but can be circumstantial.

(*Id.* at 40-41).

Then, the defendant must demonstrate "that, based on the evidence before the court and drawing all reasonable inferences in plaintiff's favor, no jury could find defendant liable under any of the evidentiary routes: under the *McDonnell Douglas* test, or as one of a number of mixed motives, by direct or circumstantial evidence." (*Id.* at 41).

1. *Prima facie* claim and non-discriminatory reason for rescission of offer

Here, defendants offer a non-discriminatory reason for rescission of plaintiff's offer: her lack of responsibility, evidenced by her failure to locate DOH's office on September 4 and promptly communicate with DOH as to her hospitalization on September 5. Accordingly, I decline to consider whether plaintiff has established a *prima facie* claim and instead determine whether plaintiff has demonstrated pretext or mixed motive. (*See supra*, III. A).

2. Pretext

Here, Marcus's testimony contains no indication that he considered plaintiff's pregnancy in deciding to rescind her offer. Given his explanation regarding her demonstrated lack of responsibility and reliability, that he made his decision after discovering she was pregnant and without regard to the severity of her condition evidences neither pretext nor mixed motive. There is also no evidence that he altered Armstrong's summary in a manner as to misrepresent the course of events leading to the rescission of the offer. Therefore, no discriminatory motive

may be inferred from his review of the memorandum or his request that Armstrong send only it to human resources.

Moreover, the timing of Lamont's request for a telephone conference does not call into question her explanation for it, as she had already expressed her intent to rescind the offer, and there is no evidence that she considered plaintiff's pregnancy as an additional reason for doing so. In any event, as she was neither obligated to heed McCormack and Morriss's recommendation nor empowered to make the decision herself, there is no evidence she requested the conference to do anything other than expedite the decision-making process.

Accordingly, affording plaintiff every favorable inference, she has failed to offer evidence that either directly or circumstantially reflects that defendants' proffered reason for the rescission of the offer was pretextual or that they were motivated in part by discriminatory animus.

B. Judicial estoppel

Given this result, whether plaintiff is judicially estopped from seeking damages from defendants need not be determined.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for an order dismissing plaintiff's complaint is granted.

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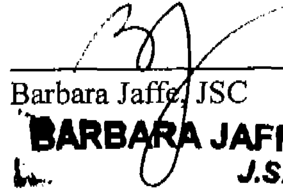

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

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