

<b>Curtin v J-V Successors, Inc.</b>
2017 NY Slip Op 30651(U)
April 5, 2017
Supreme Court, New York County
Docket Number: 152151/2014
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 47

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ANNE MARIE CURTIN,

Plaintiff,

Index No.: 152151/2014

-against-

Motion Seq. 003

J-V SUCCESSORS, INC d/b/a KEATS BAR  
and ALEX NICHOLAS,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Exhibits Annexed	<u>1</u>
Answering Affidavits/Affirmations/Exhibits Annexed	<u>2</u>
Reply Affidavits/Affirmations/Exhibits Annexed	<u>3</u>

***ERIKA M. EDWARDS, J.:***

Plaintiff Anne Marie Curtin (“Plaintiff”) brought this action for employment discrimination based on her temporary disability and failure to provide reasonable accommodation against her previous employer, Defendants J-V Successors, Inc. d/b/a Keats Bar (“Keats Bar”) and Alex Nicholas (“Nicholas”) (collectively, “Defendants”). Plaintiff had worked at Keats Bar for almost 20 years and worked her way up from waitress, to bartender, to day manager, to general manager. Plaintiff alleges that Defendants terminated her employment via email on October 31, 2013, because of her 12-week temporary disability after sustaining a broken leg in a bicycle accident on July 17, 2013, in violation of the New York City Human

Rights Law (NYCHRL).<sup>1</sup> Defendants deny any discrimination and allege in substance that they terminated Plaintiff's employment because her position was phased out and she was no longer needed. Defendants also claim they offered reasonable accommodation by permitting Plaintiff to take the necessary time off from work and offering her the opportunity to work from home during her disability.

Defendants now move for summary judgment dismissal of all of Plaintiff's claims against them and for attorney's fees and costs. Plaintiff opposes the motion. As set forth herein, the court GRANTS Defendants' motion for summary judgment and DENIES Defendants' motion for attorney's fees and costs.

Defendants argue in substance that they are entitled to summary judgment dismissal because Plaintiff failed to set forth a prima facie case for disability discrimination under NYCHRL or for failure to provide reasonable accommodation and no material issues of fact in dispute remain. Defendants further argue that Plaintiff failed to demonstrate discrimination because she failed to show how she was qualified to hold the position since it did not exist prior to Plaintiff; that her termination occurred under circumstances giving rise to an inference of discrimination, as Defendants created the job description specifically for Plaintiff, Defendant Nicholas visited Plaintiff and emailed Plaintiff during her disability to see how she was doing and he kept her on the payroll for 14 weeks until she was terminated; that there was differential treatment; or that Defendants' non-discriminatory claims are simply pretexts for their true discriminatory intent. Additionally, Defendants argue that Defendant Nicholas testified that he

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<sup>1</sup> Plaintiff withdrew her third cause of action for intentional infliction of emotional distress.

had been charitably giving plaintiff work for years just to keep her in the Keats family and that he fired her because he decided to terminate the day manager position, which the parties agree meant general manager position, and there would be nothing for her to do.

Defendants also argue in substance that they are entitled to summary judgment dismissal of Plaintiff's claim for failure to provide reasonable accommodation because Defendants met their burden of offering reasonable accommodation as an affirmative defense. Defendants claimed that Plaintiff failed to set forth a prima facie showing that she could perform the essential elements of the position based on her contradictory statements set forth in her New York State short-term disability application when she claimed to be disabled and unable to work, with or without accommodation.

Plaintiff opposes Defendants' motion and argues in substance that Plaintiff has set forth a prima facie case for employment discrimination and failure to provide reasonable accommodation and that issues of material facts in dispute remain. Plaintiff further argues that Defendants' purported justification for terminating Plaintiff's employment is a pretext for discrimination and Defendants lacked good faith with respect to providing reasonable accommodation by claiming it would be a hassle to set up a remote computer on the street level of the bar so Plaintiff would be able to work without having to go up and down the stairs to the office, as suggested by Plaintiff's husband.

Plaintiff further alleges that the inconsistencies in Defendant Nicholas' deposition testimony demonstrate that Defendants' claims are false, including that Plaintiff's managerial position was terminated, but he admitted to taking over her duties, having to go to the bar four to five times per week and redistributing Plaintiff's duties to other employees who Plaintiff claims

were not disabled. Additionally, Defendants' claim that they offered Plaintiff an opportunity to work from home is misleading because Defendant Nicholas only provided Plaintiff with a binder to do data entry from home for a day or two and he prevented her from completing the assignment. Plaintiff also alleges that she was qualified to work in any position, except cook, and to supervise all positions at the bar. Also, after she was medically cleared to return to work on November 18, 2013, she was willing to accept any other full-time or part-time position, such as night manager, bartender, or waitress.

#### Summary Judgment

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the

existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is “often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue” (Siegel, NY Prac § 278 at 476 [5<sup>th</sup> ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

In applying these principles to the facts in this case, the court finds that Plaintiff failed to set forth a prima facie case for disability discrimination under NYCHRL or for Defendants’ failure to provide reasonable accommodation, that Defendants demonstrated a prima facie showing that they provided reasonable accommodation and that Plaintiff failed to raise material issues of fact in dispute which require a trial in this matter.

#### Disability Discrimination Under NYCHRL

Pursuant to the New York City Human Rights Law, it is an unlawful discriminatory practice for an employer to refuse to hire, employ, discharge from employment, or discriminate against an individual in compensation, or in terms, conditions, or privileges of employment because of the individual’s disability (NYC Admin Code § 8-107[1][a]). Disability is defined as “any physical, medical, mental or psychological impairment, or a history or record of such impairment” (NYC Admin Code § 8-102[16][a]).

In evaluating claims under the NYCHRL, the court must evaluate the claims with regard for the NYCHRL’s “uniquely broad and remedial purposes” which exceed the New York State and federal civil rights laws (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 66 [1<sup>st</sup> Dept 2009] [internal quotation marks and citation omitted]). To establish a case of disability

discrimination the plaintiff “must demonstrate that he or she suffered from a disability and that the disability caused the behavior for which he or she was terminated” (*Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 [1<sup>st</sup> Dept 2006]).

Courts can only grant a defendant’s motion for summary judgment dismissing a plaintiff’s claim for disability discrimination under the NYCHRL if the defendant demonstrates its entitlement to summary judgment under both the *McDonnell Douglas* burden-shifting framework and the mixed-motive framework (*McDonnell Douglas Corp. v Green*, 411 US 792 [1973]; *Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 [1<sup>st</sup> Dept 2016]).

In the burden-shifting analysis, the plaintiff has the initial burden to establish a prima facie case of discrimination by setting forth that plaintiff (1) is a member of a protected class; (2) was qualified to hold the position; (3) was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]; *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 [1<sup>st</sup> Dept 2009]).

If the plaintiff is able to set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating that the plaintiff was discharged for “legitimate, independent, and nondiscriminatory reasons to support its employment decision” (*Baldwin*, 65 AD3d at 965 [internal quotation marks and citation omitted]). If the employer meets this burden, “the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating that the stated reasons were false and that discrimination was the real reason” (*id.* [internal quotation

marks and citation omitted]).

Under the mixed-motive analysis the court must consider whether there exist triable issues of fact that discrimination was one of the motivating factors for the defendant's conduct, even if it was not the sole motivating factor (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 127 [1<sup>st</sup> Dept 2012] [internal quotation marks and citations omitted]). The defendant's "production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the action was motivated at least in part by . . . discrimination" (*id.* [internal quotation marks and citations omitted]). Additionally, courts have held that "[t]here is no question that a reduction in force undertaken for economic reasons is a nondiscriminatory basis for employment terminations" (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 515 [1<sup>st</sup> Dept 2016] [internal quotation marks and citations omitted]).

In applying these principles to the facts in this case, the court finds that Plaintiff failed to set forth a prima facie case for disability discrimination under NYCHRL by failing to show that her disability caused her termination, that it gave rise to an inference of discrimination, or that it was one of the motivating factors for her termination. Even if Plaintiff had satisfied her burden, then Defendants demonstrated their entitlement to summary judgment dismissal under both the *McDonnell Douglas* burden-shifting framework and the mixed-motive framework by demonstrating a legitimate, non-discriminatory reason for Plaintiff's termination. Additionally, Plaintiff failed to establish that such reason was a pretext for Defendant's discrimination or that it was a motivating factor in her termination. Finally, Plaintiff failed to raise material issues of fact in dispute which require a trial in this matter. As such, the court grants Defendants' motion for summary judgment and dismisses Plaintiff's complaint.



### Failure to Provide Reasonable Accommodation

Under the NYCHRL, an employer's failure to "make reasonable accommodation to enable a person with a disability to satisfy the essential requisites of a job or enjoy the right or rights in question provided that the disability is known or should have been known" by the employer is a form of discrimination (NYC Admin Code § 8-107 [15][a]). In any case involving the need for reasonable accommodation, it is an affirmative defense that the employee "could not, with reasonable accommodation, satisfy the essential requisites of the job or enjoy the right or rights in question" (NYC Admin Code § 8-107 [15][b]). A reasonable accommodation means "such accommodation that can be made that shall not cause undue hardship in the conduct of the" employer's business and the employer has the burden of proving undue hardship (NYC Admin Code § 8-102[18]; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 885 [2013] [internal quotation marks and citation omitted]; *Phillips v City of New York*, 66 AD3d 170, 183).

The determination of whether an accommodation is effective is "case-specific" (*Phillips v City of New York*, 66 AD3d at 180). Because the NYCHRL provides broader protections against disability discrimination than the New York State HRL, the NYCHRL "unquestionably forecloses summary judgment where the employer has not engaged in a good faith interactive process regarding a specifically requested accommodation" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 837-838 [2014]). Under NYCHRL, even if a disabled employee failed to specifically request an accommodation, an employer still has an independent duty to make reasonable accommodation (*see Miloscia v B.R. Guest Holdings LLC*, 33 Misc 3d 466, 477 [Sup Ct, NY County 2011], *affd in part, mod in part*, 94 AD3d 563 [1<sup>st</sup> Dept 2012]).

However, an employer's "decision to engage in or forgo an interactive process is but one factor to be considered in deciding whether a reasonable accommodation was available for the employee's disability at the time the employee sought accommodation" (*Jacobsen*, 22 NY3d at 838). An employee cannot win at trial or on summary judgment "solely based on the employer's failure to engage in an interactive process. Likewise, at trial on [a NYCHRL claim] the employer does not automatically fail to establish the affirmative defense premised on the lack of any reasonable accommodation solely because it did not participate in an interactive process, though that failure poses a formidable obstacle to the employer's attempt to prove that no reasonable accommodation existed for the employee's disability" (*id.*).

"[A] temporary leave of absence, even an extended leave, can be a reasonable accommodation" (*Fernandez v Windmill Distrib. Co.*, 159 F Supp 3d 351, 366 [SDNY 2016] [internal quotation marks and citation omitted]).

In the instant matter, Defendants pleaded reasonable accommodation as an affirmative defense in their answer and stated as follows:

"The Plaintiff was unable to satisfy the essential requisites of her job with a reasonable accommodation. The essential requisites of the Plaintiff's job required the Plaintiff to be able to descend and climb stairs to the office space, navigate behind the bar to serve customers and supervise other staff. Because the essential requisites of the Plaintiff's job required the physical movement Plaintiff could not perform, the Plaintiff requested and was granted a leave of absence."

Defendants' Exhibit 2, Answer, ¶ 10.

Defendants met their initial obligation to plead reasonable accommodation as an affirmative defense. Although the parties disagree as to whether Defendants engaged in a good faith interactive process with Plaintiff after she became disabled, such dispute is not determinative of the outcome of this motion because Defendants granted Plaintiff's request for

the reasonable accommodation of a temporary leave of absence and they accepted her position that she was totally disabled and unable to weight bear during this period.

Although Defendants claim that Plaintiff should be estopped from pursuing a discrimination action because she purported to be totally disabled and unable to perform her job responsibilities, even with an accommodation, in her application for disability benefits, this court disagrees and finds that such statements are not inconsistent with her claims in this case (*see Duckett v New York Presbyt. Hosp.*, 130 AD3d 473, 474 [1<sup>st</sup> Dept 2015]).

Although Plaintiff alleges that she could have performed her job responsibilities with other accommodations, Defendants demonstrated that Plaintiff was unable to satisfy the essential requisites of her job responsibilities with a reasonable accommodation so they chose to grant her request for a leave of absence. Defendants were not required to implement a specific type of reasonable accommodation. Therefore, Defendant Nicholas' refusal to set up a remote computer on the first floor of the bar, without apparent serious consideration, or his decision to take back a binder which prevented Plaintiff from entering data into a computer at home do not rise to the level of a failure to engage in a good faith interactive process with Plaintiff under these circumstances. This is particularly true where Defendants granted Plaintiff's request for a leave.

Although it is unclear as to when Plaintiff or Defendants were made aware that Plaintiff could return to work on November 18, 2013, it is of no moment since Defendants do not allege that such delay in Plaintiff's return was an undue hardship for them to keep Plaintiff's position unfilled and Defendants demonstrated that they terminated Plaintiff because they no longer needed a general manager.

Defendants provided reasonable accommodation by granting Plaintiff's request for a leave of absence for the amount of time initially requested, plus an additional three weeks until she was terminated. As discussed above, the court finds that the Defendants' reason for terminating Plaintiff's employment does not rise to an inference of discrimination. As such, Defendants' accommodation was reasonable under the circumstances and it was not a factor in Plaintiff's termination.

Accordingly, Defendants have established their entitlement to judgment as a matter of law on plaintiff's claim for failure to provide reasonable accommodation.

Finally, the court does not find Plaintiff's complaint to have been frivolous and denies Defendants' request for attorney's fees and costs.

#### **CONCLUSION**

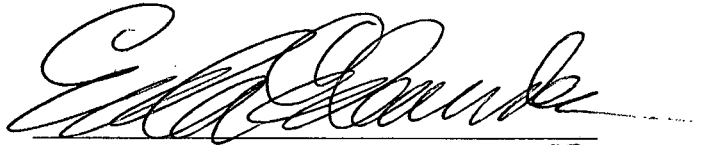
For the reasons set forth above, the court grants Defendants' motion for summary judgment dismissal of all claims and denies Defendants' motion for attorney's fees and costs. Accordingly, it is hereby

**ORDERED** that the motion for summary judgment of Defendants J-V Successors, Inc d/b/a Keats Bar and Alex Nicholas to dismiss Plaintiff Anne Marie Curtin's complaint is **GRANTED** and Plaintiff's complaint is dismissed in its entirety as against Defendants J-V Successors, Inc d/b/a Keats Bar and Alex Nicholas with prejudice and the Clerk is directed to enter judgment accordingly in favor of Defendants J-V Successors, Inc d/b/a Keats Bar and Alex Nicholas as against Plaintiff; and it is further

**ORDERED** that Defendants J-V Successors, Inc d/b/a Keats Bar and Alex Nicholas' motion for attorney's fees and costs is **DENIED**.

This constitutes the decision and order of the court.

Dated: April 5, 2017



HON. ERIKA M. EDWARDS, *JCL*