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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD' PART 35

Justice

VIG, JOEL

INDEX NO. 114613/07

MOTION DATE 5/6/08

- v -

MOTION SEQ. NO. 002

New York Hairspray Co., L.P.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The within motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the motion of defendant The New York Hairspray Co., L.P., for an order pursuant to CPLR 3211(a)(7) dismissing the complaint of plaintiff Joel Vig, **is granted and the complaint is dismissed with prejudice**; and it is further

ORDERED that counsel for defendant shall serve a copy of this Order with notice of entry within twenty days of entry, on counsel for plaintiff; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment according.

Dated: 7/3/08

HON. CAROL EDMEAD' J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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JOEL VIG,

Plaintiff,

-against-

THE NEW YORK HAIRSPRAY CO., L.P.,

Defendant.

---x

Index No. 114613/07

DECISION/ORDER

EDMEAD, J.S.C.

Defendant The New York Hairspray Co., L.P. ("defendant") moves for an order pursuant to CPLR 3211(a)(7) dismissing the complaint of plaintiff Joel Vig ("plaintiff").

The Amended Complaint

Plaintiff was an actor and musician in the defendant's production of the musical play Hairspray. In said production, he portrayed the parts of the Principal, Mr. Spritzer, Mr. Pinky, the Policeman, the Flasher, and a Prison Guard. Plaintiff also understudied the roles of Edna Turnblad for Harvey Fierstein and the role of Wilbur Turnblad for Dick Latessa. He also played the glockenspiel as a musician in the production.

Plaintiff performed his duties under both the Actors Equity Union Contract and the Musicians Union Contract.

In or about February 11, 2004, plaintiff was injured in the course of his employment in the opening number of the Wednesday Matinee, slipping and falling in front of the audience, banging his right knee, twisting the left knee and causing a tear in the left meniscus. After missing four performances, plaintiff returned for the evening performance on February 14, 2004 and performed every show thereafter until the middle of August 2004 when plaintiff had his

surgery, except for a one-week vacation at the end of June 2004. The Stage Manager approved the date of August 18, 2004 for plaintiff's surgery and instructed plaintiff to place a note in the Company Manager's box requesting leave for the surgery. Plaintiff was informed by Marc Borsak, the Company Manager, that leave was approved. Leave was also approved by, among others, plaintiff's immediate supervisor, Lon Hoyt, the conductor of the show, House Contractor Clint de Ganon, and Frank Lombardi, the Production Stage Manager.

Thereafter, plaintiff had the surgery performed on August 18, 2004.

Plaintiff received Workers' Compensation benefits for the period of August 18, 2004 through November 16, 2004. And, plaintiff received a permanency award from the Workers' Compensation carrier as the result of his injury.

On or about November 16, 2004, plaintiff returned to the theater ready, willing and able to resume his position, having been informed by the doctor that he was able to resume his duties. Upon appearing at the theater on November 16, 2004, the Theater Manager of the defendant indicted that Laura Green ("Green"), the General Manager of the defendant, had informed him that he was not to allow the plaintiff into the theater to resume his duties.

Plaintiff thereafter sought arbitration pursuant to his status as a member of the Musicians Union. However, at the arbitration, the arbitrator found that although plaintiff had brought the arbitration pursuant to the Musicians Union contract, that plaintiff was considered to be more of an actor than a musician and therefore that plaintiff was bound by the Actors Equity Union contract. Based upon the Actors Equity Union contract, inasmuch as at the time of his willingness to return to work in November of 2004 plaintiff's Actors Equity Union contract had expired (as of October 2004), the arbitrator ruled that plaintiff need not be reinstated.

The cause of termination in writing from Laura Green was, "As there are less than the required nine weeks remaining on your contract from the first day of your requested disability leave (see Rule 34(I)(9); you are not eligible for a disability leave;..."

This action resulted.

Plaintiff's causes of action herein are:

(1) His termination was due to his surgery resulting in plaintiff's suffering from an impairment; and

(2) defendant perceived plaintiff was disabled as a result of his history of physical impairment and condition resulting from his surgery.

Defendant's Contentions

Because plaintiff previously failed to plead facts to establish that he was terminated *because of* his disability in his Amended Complaint, and because plaintiff now concedes that he is without additional facts to proffer to this Court to state his *prima facie* case, this action should be finally dismissed with prejudice.

The law is clear that to survive a motion to dismiss under the State Human Rights Law or the New York City Administrative Code, a plaintiff must plead facts demonstrating not only (i) that the individual suffers from a disability, but also (ii) that the disability caused the behavior for which he or she was discriminated against. Not only does plaintiff fail to allege causality between the two facts, but he continues to fail to state facts to support even a hint of causality. Plaintiff instead pleads a legal conclusion - he was discriminated against because of .... - as a fact.

Plaintiff's pleading is all the more deficient in light of the facts that he has plead which actually undercut his disability claims. Plaintiff concedes that despite being injured on February

11, 2004, defendant allowed him to work "every show thereafter until the middle of August 2004 when I had my surgery," and further concedes that defendant made an accommodation by allowing him to perform while not "twist[ing] or jump[ing]" during those performances, tasks that were germane to his role in the show. Finally, plaintiff claims that he was terminated when he was no longer disabled, but rather "ready, willing and able to resume his position," in November of 2004.

Plaintiff's Opposition

Plaintiff's Amended Complaint is replete with facts detailing violation of the New York City Human Rights Law by defendant: plaintiff was injured on the job, he received a "permanency" award from Workers' Compensation, he was reasonably able to do the job as verified by defendant's own doctor, and that without any reason he was terminated.

It is clear that defendant refused to allow plaintiff to return to work because, at the time of his termination, either plaintiff had been disabled or was disabled as plaintiff was suffering from the *sequellae* of a torn meniscus and the surgery which had been done with respect thereto or because the defendant perceived that plaintiff was continuing to suffer from such an impairment.

Analysis

CPLR 3211 [a] [7]: Dismiss for Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause

of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.,* 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

On a motion to dismiss directed at the sufficiency of the complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings: "The scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed" (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, *citing P.T. Bank Central Asia v Chinese Am. Bank,* 301 AD2d 373, 375 [2003]), the object being "to determine if,

assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (*id. at 376; see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]).

It is the movant who has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *See Leon v Martinez,* 84 N.Y.2d at 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994); *Guggenheimer v Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 (1977); *Salles v Chase Manh attan Bank,* 300 A.D.2d 226, 228, 754 N.Y.S.2d 236 (1st Dept.2002).

The statutory bases for plaintiff's claims are York City Administrative Code §§ 8-102(16)(a)[1], 8-107(1)(a)[2], 8-502[3] New York State Human Rights Law (Executive Law Article 15)

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[1] NYC Adm. Code 8-102(16)(a) provides: "The term 'disability' means any physical, medical, mental or psychological impairment, or a history or record of such impairment."

[2] NYC Adm. Code § 8-107(1) provides: "It shall be an unlawful discriminatory practice:
(a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status 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."

[3] NYC Adm. Code § 8-502, entitled "Civil action by persons aggrieved by unlawful discriminatory practices" provides, in part, that: a. Except as otherwise provided by law, any person claiming to be aggrieved by an unlawful discriminatory practice as defined in chapter one of this title or by an act of discriminatory harassment or violence as set forth in chapter six of this title shall have a cause of action in any court of competent jurisdiction for damages, including punitive damages, and for injunctive relief and such other remedies as may be appropriate, unless such person has filed a complaint with the city commission on human rights or with the state division of human rights with respect to such alleged unlawful discriminatory practice or act of discriminatory harassment or violence. For purposes of this subdivision, the filing of a complaint with a federal agency pursuant to applicable federal law prohibiting discrimination which is subsequently referred to the city commission on human rights or to the state division of human rights pursuant to such law shall not be deemed to constitute the filing of a complaint under this subdivision. b. Notwithstanding any inconsistent provision of subdivision a of this section, where a complaint filed with the city commission on human rights or the state division on human rights is dismissed by the city commission on human rights pursuant to subdivisions a, b or c of section 8-113 of chapter one of this title, or by the state division of human rights pursuant to subdivision nine of section two hundred ninety-seven of the executive law either for administrative convenience or on the grounds that such person's election of an administrative remedy is annulled, an aggrieved person shall maintain all rights to commence a civil action pursuant to this chapter as if no such complaint had been

§ 296[4], and 297(9)[5] and 292(21)[6].

Because these anti-discrimination statutes are remedial, they must be interpreted liberally to achieve their intended purpose (*see Matter of N.Y. County DES Litig. [Wetherill v Eli Lilly &*

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footnote cont'd

filed.

[4] Executive Law § 296(1)(a) provides, inter alia, that it is an unlawful discriminatory practice for an employer to discharge an employee on the basis of a disability (*Germakian v Kenny Intern. Corp.*, 151 AD2d 342, 543 NYS2d 66 [1st Dept 1989]).

[5] NY Exec. Law § 297(9) provides: Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages, including, in cases of housing discrimination only, punitive damages, and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section, unless such person had filed a complaint hereunder or with any local commission on human rights, or with the superintendent pursuant to the provisions of section two hundred ninety-six-a of this chapter, provided that, where the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division. At any time prior to a hearing before a hearing examiner, a person who has a complaint pending at the division may request that the division dismiss the complaint and annul his or her election of remedies so that the human rights law claim may be pursued in court, and the division may, upon such request, dismiss the complaint on the grounds that such person's election of an administrative remedy is annulled. Notwithstanding subdivision (a) of section two hundred four of the civil practice law and rules, if a complaint is so annulled by the division, upon the request of the party bringing such complaint before the division, such party's rights to bring such cause of action before a court of appropriate jurisdiction shall be limited by the statute of limitations in effect in such court at the time the complaint was initially filed with the division. Any party to a housing discrimination complaint shall have the right within twenty days following a determination of probable cause pursuant to subdivision two of this section to elect to have an action commenced in a civil court, and an attorney representing the division of human rights will be appointed to present the complaint in court, or, with the consent of the division, the case may be presented by complainant's attorney. A complaint filed by the equal employment opportunity commission to comply with the requirements of 42 USC 2000e-5(c) and 42 USC 12117(a) and 29 USC 633(b) shall not constitute the filing of a complaint within the meaning of this subdivision. No person who has initiated any action in a court of competent jurisdiction or who has an action pending before any administrative agency under any other law of the state based upon an act which would be an unlawful discriminatory practice under this article, may file a complaint with respect to the same grievance under this section or under section two hundred ninety-six-a of this article.

[6] NY Exec. Law §292(21) provides: The term "disability" means (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.

Co.], 89 N.Y.2d 506, 514, 655 N.Y.S.2d 862, 678 N.E.2d 474 [1997], citing *Rothstein v Tennessee Gas Pipeline Co.*, 87 N.Y.2d 90, 96, 637 N.Y.S.2d 674, 661 N.E.2d 146 [1995], McKinney's Cons. Laws of NY, Book 1, Statutes @ 96, at 209). Indeed, a broad interpretation is particularly appropriate since "the very purpose of the Human Rights Law was ... to eliminate all forms of discrimination, those then existing as well as any later devised" (*Brooklyn Union Gas Co. v New York State Human Rights Appeal Bd.*, 41 N.Y.2d 84, 89, 390 N.Y.S.2d 884, 359 N.E.2d 393 [1976]).

A complaint states a *prima facie* case of discrimination under both the Executive Law and the Administrative Code of the City of New York if the individual suffers from a disability and the disability caused the behavior for which the individual was terminated (*see Matter of McEniry v Landi*, 84 N.Y.2d 554, 558, 620 N.Y.S.2d 328, 644 N.E.2d 1019; *see also Pimentel v Citibank, N.A.*, 29 A.D.3d 141, 141, 811 N.Y.S.2d 381; *Thide v New York State Dept. of Transp.*, 27 A.D.3d 452, 453, 811 N.Y.S.2d 418; *Timashpolsky v State Univ. of N.Y. Health Science Ctr.*, 306 A.D.2d 271, 272, 761 N.Y.S.2d 94).

Plaintiff herein has failed to state even a low threshold, *prima facie* claim of disability/perceived discrimination by virtue of defendant's termination. He has failed to allege sufficient facts to support a claim of discrimination on the basis of disability, or of perceived disability. The plaintiff has offered instead conclusory assertions without factual support (*see Sotomayor v Kaufman, Malchman, Kirby & Squire*, 252 A.D.2d 554, 554, 675 N.Y.S.2d 894). Therefore, he failed to state causes of action to recover damages for employment discrimination on the basis of disability pursuant to Executive Law § 296 and Administrative Code of the City of New York § 8-107.

Plaintiff herein simply fails to connect the dots. Plaintiff asserts that the defendant never gave him any valid reason for termination. He then surmises: "It is clear that the Defendant refused to allow me to return to work because, at the time of my termination, either I had been disabled or was disabled as I was suffering from the *sequellae* of a torn meniscus and the surgery which had been done with respect thereto....." This amounts to speculation, and conclusion without foundation. Plaintiff fails to delineate sufficient facts to support the causal connection.

Conclusion

This court is always loathe to deny a plaintiff his day in court; however, in the instant case, it is hereby

ORDERED that the motion of defendant The New York Hairspray Co., L.P., for an order pursuant to CPLR 3211(a)(7) dismissing the complaint of plaintiff Joel Vig, **is granted and the complaint is dismissed with prejudice**; and it is further

ORDERED that counsel for defendant shall serve a copy of this Order with notice of entry within twenty days of entry, on counsel for plaintiff; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment according.

Dated: July 3, 2008

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED

JUL 08 2008

COUNTY CLERK'S OFFICE
NEW YORK