Ndiwe v City of New York
2010 NY Slip Op 34010(U)
May 19, 2010
Supreme Court, New York County
Docket Number: 105253/05
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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CHRISTOPHER NDIWE,

Plaintiff,

Index No. 105253/05

-against-

DECISION/ORDER

CITY OF NEW YORK and ELENA HOLMES,

Defendants.

---x

HON. CYNTHIA S. KERN, J.S.C.

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

Papers	Numbered
Notice of Motion and Affidavits Annexed..................................	1
Notice of Cross Motion and Answering Affidavits......................	2
Replying Affidavits..	3, 4
Exhibits..	5

Plaintiff commenced the instant action against defendants asserting a claim for discrimination on the basis of disability. Defendants the City of New York (the "City") and Elena Holmes now move for summary judgment dismissing plaintiff's claims on the grounds that they are barred by the doctrines of waiver and release or, if not so barred, that there are no genuine issues of material fact. For the reasons set forth below, defendants' motion is granted.

The relevant facts are as follows. Plaintiff suffers from a mental illness variously identified as bipolar depression, depression and schizophrenia. He was employed by the City of New York for the Human Resources Administration ("HRA") from 1989 until 1991. At that time, he held the title Case Worker. During that time, his behavior became erratic and resulted in

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unsatisfactory work performance which culminated in his termination on April 4, 1991. Plaintiff has since been treated for his mental illness and currently takes medication daily to control it. He has held a number of different jobs since then.

On or about May 24, 2004, plaintiff applied for the provisional position of Job Opportunity Specialist with HRA. On his employment application, he indicated that he had been "laid off" from his previous position with HRA and that he had never been disciplined in any employment position. He signed an affirmation affirming the truth of the statements in his application. Plaintiff received a conditional job offer and was informed in writing that "HRA reserves the right to withdraw any offer of employment... made prior to an actual notice of the effective date of employment." On June 16, 2004, HRA Assistant Deputy Commissioner Candida Carcana sent a letter to Seth Diamond, Executive Deputy Commissioner of Family Independence Administration stating that "Mr. Ndiwe's personnel records indicate termination... for unsatisfactory work performance." Louise Abney, a job analyst for HRA, had prepared that letter On June 22, 2004, Mr. Diamond sent a handwritten note to Enrique Arroyo, Director of the Office of Personnel for HRA that stated, "Ndiwe was terminated from HRA, although a while ago. I would say no unless we know it was for something small." Mr. Arroyo then prepared a "no hire" memo for Mr. Diamond to sign. On June 23, 2004, Mr. Diamond issued a formal memo recommending that plaintiff not be hired. By letter dated July 1, 2004, plaintiff was informed he would not be appointed to the position he had applied for. Plaintiff alleges that a family friend, Henry Orah, subsequently called on his behalf to find out why he was ultimately not hired. Plaintiff alleges that he was on the telephone, silently, and that Elena Holmes, a manager in the employment processing unit of HRA, informed him that plaintiff had not been

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hired because of what was in his medical file. Ms. Holmes denies ever speaking to Mr. Orah. Plaintiff commenced the instant action on April 15, 2005.

Also in 2004, plaintiff sued the City and the New York City Transit Authority alleging various tort claims. On or about March 26, 2007, that action was settled when he signed a general release in consideration of the sum of $17,500. That release stated that he released and discharged the City of New York for "all actions, causes of action, suits.. and demands" against the City which he "ever had, now have or hereafter can, shall or may, have" and that it was "in particular for injuries sustained on October 19, 2002." Plaintiff was represented by counsel in connection with this settlement and release, but different counsel than those who represent him in the instant action. He did not consult his attorneys in the instant action regarding the settlement or release.

The first issue the court must address is whether the release plaintiff signed encompasses the claims in the instant action. "The meaning and coverage of a general release necessarily depends upon the controversy being settled and upon the purpose for which the release was given. A release may not be read to cover matters which the parties did not intend to cover." *Dillon v Dean*, 236 A.D.2d 360 (2nd Dept 1997). In *B.B.&S. Treated Lumber Co. v Groundwater Technology, Inc.*, the Second Department, relying on *Dillon*, stated that "Here, the settlement and release pertained solely to the plaintiff's claim against [third-party], and were not intended to dispose of claims arising in [an] entirely different context." 256 A.D.2d 430, 432 (2nd Dept 1998). Although in the instant case the release purports to release "all claims" against the City, plaintiff has testified, and defendants have not disputed, that he did not intend to release the claims in the instant action. As in *Treated Lumber*, the claims that were the subject of the release

were of an entirely different nature and in an entirely different context than the claims at issue in the instant matter. Although the claims released in *Treated Lumber* were claims against a third-party and not a direct defendant, the principle that the intent of the parties matters and that the release may not apply to claims in an entirely different context still applies. *See* 256 A.D.2d at 432. Accordingly, plaintiff's claims are not barred by the March 2007 release.

The cases cited by defendants are inapposite. In *Skluth v Untied Merchants & Mfrs., Inc.*, the First Department held that a release which was clear and unambiguous on its face must be enforced as written. 163 A.D.2d 104 (1st Dept 1990). However, in that case, the release referred to all claims arising out of plaintiff's employment with defendant and the claim that plaintiff wanted to bring was an employment discrimination claim. Plaintiff argued that the release did not apply because he learned information later regarding who had replaced him. Although the plaintiff had different information, the nature of the claim was exactly the type that plaintiff had intended to release. Similarly, in *Pampillonia v RJR Nabisco, Inc.*, 138 F.3d 459 (2nd Cir 1998), plaintiff sought to bring an employment discrimination claim after he had signed a release relinquishing all claims arising out of his employment because he had allegedly learned after signing the release that he had been terminated for protesting discrimination by his employer. Again, as in *Skluth*, the plaintiff was attempting to bring the specific type of claim barred by the release because he had acquired additional information after he had signed it. In the instant action, plaintiff does not base his claim on later-acquired information, but instead seeks to bring a claim of an entirely different type and unrelated in any way to that he intended to relinquish by signing the 2007 release. Accordingly, the release does not bar the instant claims.

Now the court turns to the issue of whether defendants failed to hire plaintiff because of

his disability. It is illegal under the State and City Human Rights Laws to refuse to hire someone because of his disability. NY Executive Law 296(1)(a) and NYC Administrative Code 8-107(1)(a). Claims under those statutes are analyzed the same way as federal claims *(see Forrest v Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 (2004); *Ferrante v American Lung Assn.*, 90 N.Y.2d 623 (1997)) although the definition of "disability" in both the State and City laws is broader. *See Giordano v City of New York*, 274 F.3d 740, 754 (2nd Cir 2001). Plaintiff and defendants both analyze plaintiff's claim under the so-called "pretext" framework. This framework requires plaintiff to demonstrate (1) membership in a protected class, (2) qualification for the employment, (3) an adverse employment action and (4) circumstances that give rise to an inference of discrimination. *See McDonnell Douglas Corp. v Green*, 411 U.S. 792, 802 (1973). If the plaintiff establishes his prima facie case using this analysis, the burden then shifts to defendant to articulate a legitimate, non-discriminatory reason for the challenged action. *See id.* at 802-04. If the defendant does so, the burden shifts back to plaintiff to show that defendant's stated reason was merely a pretext for discrimination. *See id.*

In the instant case, there is no dispute as to the first three elements of a prima facie claim of discrimination. Plaintiff is a member of a protected class by virtue of his mental illness, defendants do not dispute that he was qualified for the position and defendants failed to hire him. Thus, the only remaining issue is whether there are circumstances which give rise to an inference of discrimination. Plaintiff fails to submit any evidence to this effect. Louise Abney, a job analyst for HRA, prepared a letter stating that plaintiff was terminated from HRA previously for unsatisfactory work performance. Candida Carcana, Assistant Deputy Commissioner of HRA signed this letter, which was sent to Seth Diamond, Executive Deputy Commissioner of the

Family Independence Administration. Based on the letter to him from Ms. Carcana, which stated only that plaintiff had been terminated for "unsatisfactory work performance," Mr. Diamond recommended against hiring plaintiff. Although other employees, including Ms. Abney, had access to plaintiff's personnel records which included his medical history, there is no evidence that Mr. Diamond had access to, or was informed of, plaintiff's medical history. Moreover, there is no evidence that Ms. Abney based her letter on plaintiff's medical condition rather than the result of that condition - his unsatisfactory work performance. Plaintiff relies on the fact that Ms. Abney saw plaintiff's medical records but that fact is insufficient to establish circumstances giving rise to an inference of discrimination. In addition, plaintiff's conclusory statement, denied by Ms. Holmes, that she told Mr. Orah and, unbeknownst to her, plaintiff himself, that he was not hired because of his medical record is similarly insufficient, particularly given that Ms. Holmes was not the ultimate decision maker regarding plaintiff's employment. As such, plaintiff is unable to make out a prima facie case of discrimination based on disability and the burden never shifts to defendants.

Accordingly, defendants' motion for summary judgment is granted and plaintiff's complaint is dismissed. This constitutes the decision and order of the court.

Dated: 5|19|10

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J.S.C.

CYNTHIA S. KERN
J.S.C.