

**New York State Div. of Human Rights v 111 Est 88th
Partners**

2012 NY Slip Op 31475(U)

June 1, 2012

Sup Ct, New York County

Docket Number: 402894/07

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK
HON. JUDITH J. GISCHT **NEW YORK COUNTY**

Index Number : 402894/2007

NEW YORK STATE DIVISION

vs.

111 EAST 88TH PARTNERS

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

PART 10

ice

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

on to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

FILED

JUN 05 2012

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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

JUN 01 2012

Dated: _____


_____, J.S.C.
HON. JUDITH J. GISCHT

- 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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
The New York State Division of Human Rights
on the complaint of Gregory Reich,
Plaintiff (s),

DECISION/ORDER
Index No.: 402894/07
Seq. No.: 002

-against-

111 East 88th Partners,
Defendant (s).
-----X

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Def's n/m (CPLR 3212) w/GRC affid, SSS affirm, exhs (on sep backs)	1,2,3
Pltf's x/m (partial 3212) w/RAG, GR, JK affids, exhs (sep backs)	4,5,6,7,8
Def's affirm in further support and in opp to x/m w/SSS affirm, GRC affid, exhs	9
Pltf's affid in further support of x/m w/GC affid	10
Pltf's reply w/RAG, JK affid (sep backs), exhs	11, 12
 Other:	
Pltf's post OA submission	13
Def's post OA submission	14
Steno Minutes 2/16/12	15
Various stips of adj	16

FILED

JUN 05 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This action is brought by the New York State Division of Human Rights ("DHR" sometimes "plaintiff") on behalf of Gregory Reich ("Reich") stating that defendant 111 East 88th Partners ("landlord") unlawfully discriminated against Reich, its tenant, by refusing to provide him with reasonable accommodations on the basis of a disability (Executive Law §§ 290, 296, 297 a/k/a the "Human Rights Law") (hereinafter "Exec Law

§___" or "NYSHRL").

The complaint seeks a declaration that the owner violated these laws, an order directing the owner to allow the tenant to have a service/support pet and keep the pet he now has, compensatory damages, punitive damages, a permanent injunction and an order requiring the owner, its agents, and employees to attend a DHR approved training program.

The landlord has answered the complaint and now seeks summary judgment in its favor on two grounds. First, that Reich does not suffer from a disability, as defined under the NYSHRL and second, Reich's pet is not actually "necessary" for him to enjoy and use the premises.

DHR has cross moved for partial summary judgment and a declaration that Reich has a "disability" as that term is defined by Exec Law § 292.21. DHR also seeks the dismissal of the landlord's legal fees claim against it. The landlord opposes DHR's cross-motion in all respects.

Since the requirements of CPLR § 3212 [a] have been met, summary judgment relief is available and these motions will be decided on their merits (CPLR 3212 [a]; Brill v. City of New York, 2 NY3d 648 [2004]).

Facts

Unless otherwise stated, the following facts are established, undisputed or unrefuted:

Reich is the tenant of Apartment 2F at 111 East 88th Street, New York, New York ("apartment"), which is rent regulated. He has lived in the apartment since his birth. In 1995, Alan Miller, Reich's partner, moved into the apartment with him. Both

sides agree the apartment is subject to a "no pets" requirement. There is, however, a dog -- "Maddy" -- occupying Reich's apartment. Reich obtained Maddy, a Siberian husky, on or about September 2, 2006. Before Maddy, Reich owned another dog (Orion) which lived with Reich and Miller from September 1997 through July 2006, when the dog had to be euthanized.

Reich contends that he is disabled and he needs Maddy (or another emotional support animal) to make him feel safe and protected, as well as to maintain and promote his emotional and physical well-being. He claims that he asked the landlord to make a reasonable accommodation, which was to let him keep the dog, but that the landlord denied that request by proceeding to evict him based upon his violation of the no-pets clause in his lease.

When Reich sent the landlord his request for an accommodation, he also sent a letter from his psychotherapist, Jerry Katz. Katz, a licensed clinical social worker ("LCSW"), stated in that letter that he began treating Reich on February 18, 2002. He diagnosed Reich with Dysthymic Disorder (DSM-IV: 300.4) which is characterized by depressed mood for most of the day, for more days than not, for at least two years, manifested by overeating, low self-esteem, low energy and feelings of hopelessness. The letter, dated October 24, 2006, goes on to state that Reich is a diabetic. According to Katz, the dog provides Reich with unconditional affection and comfort, also lifting his spirits.

Once Reich learned that the landlord was proceeding with its eviction of him, he filed a complaint with DHR under Article 15 of the Executive Law [Case No.: 10114879] alleging that the landlord had violated the NYSHRL (Exec Law § 296 [18][2]). Following

its investigation (Exec Law § 297), DHR issued a Determination of Probable Cause on February 22, 2007. Exec Law § 297 [9] provides that any party to a housing discrimination complaint shall have the right to bring such cause of action before a court of appropriate jurisdiction. The landlord, by Notice dated April 5, 2007, elected to have Reich's claim adjudicated in a civil court, prompting DHR to commence this action and assign counsel to Reich.

Among the factual allegations in the complaint are that Reich: "suffers from both physical and mental disabilities, including dysthymic disorder, depression, diabetes, dyslipidemia, and obesity" and that "[he] obtained a dog as an emotional support pet." In his Bill of Particulars, in addition to these ailments, Reich states he suffers from "hypertension, fatty liver disease, obesity, and a blocked artery that has required insertion of a stent." He references statements by Dr. Anelise Engel, a medical doctor, who is his private physician, as well as statements made by Katz. Reich also states that:

[his] mental disabilities affect his physical disabilities and health. Reich's mental disabilities manifest themselves in, among other things, negatively affecting his ability, will and desire to treat, manage and control his overall physical condition, including his diabetes, diet, weight and other physical disabilities. Reich's mental disabilities also result in feeling of helplessness and fear and results in periods when Reich engages in little or no activity and/or simply remains in his apartment...

The Bill of Particulars alleges that the dog will, among other things:

mitigate Reich's depression and dysthymia which will motivate Reich to keep himself healthy and alive and control his diabetes heart condition and physical disabilities; improve Reich's spirits and mood; allow him to feel better about himself; allow him to feel safe; assist and allow him to remain in a relationship and interact with

his partner Alan Miller... walk and get exercise; afford Reich an equal opportunity to use and enjoy his apartment and allow him to control his diabetes and heart condition by getting proper amount of restful sleep...

During discovery, Reich provided his medical record and laboratory reports. He also provided Katz's treatment notes from 2002 to 2010. In his treatment notes of March 6, 2002, Katz states that pursuant to DSM-IV, Reich has the following diagnoses: Axis I as 300.4 or Dysthymic Disorder; Axis II Personality Disorder: Narcissist Personality Disorder; and Axis III: Physical Conditions as Type II Diabetes. The lab reports show the results of Reich's glucose and triglyceride levels. Dr. Engel's examinations also contain personal information about Reich's weight, eating habits, etc.

Arguments

The landlord maintains that it did not violate the NYSHRL because Reich does not suffer from a disability, as defined under Exec Law § 292.21, but even if he does suffer from the disability claimed, Reich has not and cannot prove that Maddy is necessary for his actual enjoyment of the premises or that the condition cannot be otherwise controlled, for example, through medication. The landlord denies that the medical evidence Reich has provided warrants a determination that a reasonable accommodation should have been made by defendants so that Reich can keep a dog in his apartment.

According to the landlord, the medical records and reports that Reich relies on are not only insufficient to support Reich's claims, they actually support defendant's contention that Maddy is no more than a household pet that Reich seeks to keep, despite rules to the contrary, and because he is enraged that anyone would deny him

something he wants. It is also the landlord's contention that Maddy's presence neither improves nor mitigates Reich's claimed mental or physical disabilities and that during the time period Reich had no dog (i.e. after Orion, but before Maddy), Reich's condition did not deteriorate, but actually showed improvement, judging by the lab reports, therapeutic notes, etc. Reich has provided.

The landlord contends that Katz's treatment notes are not objective medical findings but simply a catalog of that what his patients (in this case, Reich) tells him and that Reich has failed to provide any empirical medical evidence that an emotional support pet ameliorates symptoms of Dysthymia.

The landlord has obtained a medical expert who has rendered an opinion on the issues before the court. Dr. Gary R. Collins states he is a medical doctor, board certified in psychiatry. In his affidavit, Dr. Collins sets forth an extensive list of qualifications and accomplishments to date. Presently Dr. Collins has a private practice in adult psychotherapy, psycho pharmacologic treatment and forensic consultation. He states that a regular part of his practice is diagnosing and ruling out common medical problems when evaluating a patient and making psychiatric evaluations. Such medical problems include diabetes, obesity, hypertension and fatty liver disease— ailments which Reich contends he suffers from.

Dr. Collins states he has reviewed Katz's treatment notes and concludes, based upon his review of those notes, other documents, his professional experience and knowledge that even if Reich suffers from Dysthymia¹, it is not a disability, nor a mental

¹This is a form of depression.

impairment resulting from any anatomical, physiological, genetic or neurological condition. Thus, according to Dr. Collins, this disorder does not prevent normal body function and it is a unremarkable condition, readily treatable through a combination of psychotherapy and medication. According to Dr. Collins, an emotional support pet is not part of the treatment plan guidelines established by the American Psychiatric Association.

With respect to Reich's physical ailments (diabetes, hypertension, dyslipidemia etc.) Dr. Collins opines that such health issues are conventionally controlled through diet and exercise, as recommended by the American Diabetes Association and other respected health institutions. Dr. Collins states that Dr. Engel's notes show that Reich is not a cooperative patient because Reich refuses to exercise (for example, will not walk down one flight of stairs), he does not watch his diet nor does he monitor his blood glucose. According to Dr. Collins, Reich's physical condition did not improve after he adopted Maddy, although he claims he gets more exercise since then.

Even assuming Reich has a narcissistic personality disorder ("NPD"), Dr. Collins opines that DSM-IV does not indicate the use of an emotional support pet as treatment for any of the personality disorders it encompasses. Dr. Collins states he has read articles written by Katz on the subject of personality disorders and nowhere does Katz recommend the use of support animals as part of his treatment plan. Dr. Collins opines that Katz's therapeutic relationship with Reich has become unbalanced and problematic because Katz is being manipulated by his patient and has expressed these concerns in his notes.

Dr. Collins compares the answers provided by Dr. Engel on a form questionnaire

provided by DHR (dated December 29, 2006) to Reich's medical records and lab reports. He opines that Dr. Engel's answers to a certain questionnaire, for example "yes" that a support animal assisted Reich because it improved his depression and health, are not only unsigned statements, but disproved by objective medical evidence which show that Reich had no improvement in his physical condition.

In a second affidavit dated October 28, 2011, Dr. Collins states that, based on Reich's sworn affidavit setting forth his current symptoms, including his depression on the weekends, he has reconsidered his initial opinion that Reich is dysthymic. He now opines that because the distinguishing symptom of dysthymia is feeling down for most of the day and for more days than not, Reich is not dysthymic and disputes that diagnosis.

Although Reich had a waiver of the no-pet clause for Orion, he did not obtain a similar waiver for Maddy. Thus, the landlord argues that not only did Reich obtain the new dog in total disregard for the clause, he actually got the dog because Miller wanted it, not because Reich needed it.

DHR has cross moved for partial summary judgment (CPLR § 3212 [e]) and a declaration that Reich has a "disability" as said term is defined in the NYSHRL, because Dysthymia is a mental impairment "demonstrable by medically accepted clinical or laboratory diagnostic techniques." DHR points out that Dr. Collins' opinion, that Dysthymia is "common" or "treatable" is meaningless because the text of Exec Law § 292.21 does not make such distinctions nor are the definitions, principles and cases involving the ADA applicable because the NYSHRL are broader.

DHR states that under the Rule 14 of the condominium, the board can consent

to animals, without even having to consider whether this is a reasonable accommodation. In any event, DHR maintains that a "no pet" clause does not trump the provisions of the NYSHRL and that the board has refused to even consider under the statute or its discretion whether the accommodation requested is reasonable.

DHR contends the landlord's request for legal fees is without any basis and plaintiff's motion for summary judgment should be granted, dismissing the claim for legal fees for that reason alone.

Katz was deposed for two days and has provided two sworn affidavits in support of plaintiff's motion. In his first affidavit dated August 23, 2011, Katz sets forth his qualifications and describes his practice. Like Dr. Collins, he works with adult and provides psychotherapy. He states that he and Dr. Collins "concur" that Reich suffers from a form of depression (dysthymia) and points out that their diagnosis is based upon symptoms and criteria set forth in the DSM-IV. He indicates that where they principally disagree is whether dysthymia is a "disability" within the meaning of the NYSHRLs, whether an emotional support pet is an accepted treatment for that disability and, if so, whether Reich's request that he be allowed to keep his dog is a reasonable accommodation that should be granted.

Katz opines that just because Dysthymia can be treated with therapy and/or medication, this makes it no less of a disability and he described how Reich has difficulty interacting with humans, but derives emotional support from his dog, transcending the normal sense of happiness most people derive from having a "regular" pet. Katz stated that the dog relieves some of Reich's isolation, helps him sleep and gives him a reason leave his apartment because he has to walk the dog. He explained

that the reason Reich's symptoms did not worsen, but remained stable during the 3 month period he did not have a dog is that Reich was expecting and looking forward to getting a new dog.

Katz stated in his August 23, 2011 (and at his deposition) that his notes consist of what occurred during Reich's sessions and he does not include patient treatment plans in his notes. He states this explains why Dr. Collins could not find a recommendation by him that Reich get a dog. Katz points out that the DSM-IV and other manuals Dr. Collins cites are generalized, across the board recommendations, but do not eliminate a practitioner's discretion in designing, providing and implementing individualized treatment plans.

Referring to his March 6, 2002 therapy notes, Katz stated that he has always diagnosed Reich as having (under Axis I) Dysthymia. However, he also made a tentative Axis II diagnosis of Reich having a "closeted" narcissistic personality disorder (NPD). He denies that he later changed his diagnosis from NPD to schizoid personality disorder ("SPD") to appease Reich or because he was pressured. In addition to his March 6, 2002 notes, Katz identifies other notes where, as far back as October 6, 2008, he began to make "schizoid interpretations" about Reich. According to Katz, some of the symptoms of NPD and SPD overlap and can be easily mistaken for one another. He states, however, that the angry conduct Reich exhibits is not associated with NPD, but with SPD and that such rage and anger did not immediately manifest itself.

In reply to Dr. Collin's updated opinion, Katz provides a second affidavit dated November 16, 2011. He states that after reading Dr. Collins' affidavit, he has reevaluated and reconsidered his original opinion and agrees with Dr. Collins, that

Reich is not Dysthymic, although he did suffer from Dysthymia from at least 2002 through mid-to-late 2010. He now believes that Reich's Dysthymia disguised an underlying schizoid disorder and Reich actually has SPD.

Discussion

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

To show that a violation of the NYSHRL occurred and that a reasonable accommodation should have been made with respect to his or residence, the complainant (here, Reich) must demonstrate through either medical or psychological expert testimony or evidence that he is qualified for the tenancy, that because of his disability it is necessary for him to keep the dog in order for him to use and enjoy the apartment, and that reasonable accommodations can be made to allow him to keep the dog (One Overlook Ave. Corp. v. New York State Div. of Human Rights, 8 A.D.3d 286 [2nd Dept 2004] (internal citation omitted) *lv den* 5 NY3d 174 [2005]). By law, a landlord is required to make "reasonable accommodations" to its rules so that disabled persons have "equal opportunity to use and enjoy" the rented premises (Exec Law § 296 [2-a][d][2]). Failure to do so is an unlawful discriminatory practice (Exec Law § 296 [2-a]).

Once an individual files an administrative complaint with DHR, the claim is investigated by DHR and the parties have an opportunity to make submissions and participate in the process. Where (as here) there is a finding of probable cause for the administrative complaint, then the claim either proceeds to an administrative hearing or, at the election of any party, a complaint is brought by DHR so the claim can be adjudicated in court. Pursuant to DHR's rules, only the parties and their attorneys participate in the preliminary proceedings during which time DHR inquires into the alleged facts (9 NYCRR 465.8, subd. (a), pars. (1-3); McGrath v. New York State Division of Human Rights, 52 A.D.2d 1027 [3rd Dept 1976]). A finding of probable cause or no probable cause can only be challenged via a summary proceeding brought under Exec Law § 298.

Not only did the landlord fail to challenge the probable cause determination DHR made by timely commencing such a proceeding, even if it had been made, the scope of judicial review under the NYSHRL is extremely narrow and DHR's determination, that there was probable cause, would not be annulled if supported by substantial evidence (Rauch v. New York State Div. of Human Rights, 73 A.D.3d 930 [2nd Dept. 2010]; Murapa v. Kramarsky, 88 A.D.2d 1009 [3rd Dept 1982]). DHR's investigation may be by any method deemed suitable in the discretion of the regional director (9 NYCRR 465.6). Having failed to bring a summary proceeding under Exec Law § 298, the landlord cannot now circumvent that procedure by asking the court to look beyond the complaint DHR has filed on Reich's behalf to attack the merits of DHR's probable cause determination.

The landlord claims, however, that DHR is now raising new allegations, in support of Reich's complaint for an emotional support dog and in opposition to plaintiff's cross motion for partial summary judgment, that were never raised before and are being asserted for the first time. Had this case been adjudicated before an administrative law judge, DHR could have amended its complaint at any time, even after the hearing (9 NYCRR 465.4[a]). Once DHR has made a probable cause determination, any amendments made thereafter are not subject to any further investigations or determinations of probable cause (9 NYCRR 465.4 [d]). Furthermore, the administrative law judge is free to amend the complaint to conform to the proof (9 NYCRR 465.12 [f][14]).

Where, as here, DHR proceeds to litigate a matter in court, like any other litigant, DHR cannot raise new theories of recovery not pleaded in the complaint in order to oppose a motion for summary judgment and create triable issues of fact (Ostrov v. Rozbruch, 91 A.D.3d 147 [1st Dept 2012]). However, the court may, in its discretion, always allow a complaint to be amended to conform to the evidence either before or after the trial (CPLR 3025 [c]; Loomis v. Civetta Corinno Const. Corp., 54 NY 2d 18 [1981]). A relevant consideration is whether there is any prejudice or surprise to the adverse party (Loomis v. Civetta Corinno Const. Corp., *supra*).

DHR's complaint states that Reich's "mental disabilities affect his physical disabilities and health. Reich's mental disabilities manifest themselves in, among other things, negatively affecting his ability, will and desire to treat, manage and control his overall physical condition, including his diabetes, diet, weight and other physical

disabilities. Reich's mental disabilities also result in feeling of helplessness and fear and results in periods when Reich engages in little or no activity and/or simply remains in his apartment..." In 2002, Katz's initial diagnosis of Reich was under two separate axes of the DSM-IV: Dysthymia under Axis I and a tentative diagnosis of a "closeted" narcissistic personality disorder (NPD) under Axis II.

In his supporting affidavit, Dr. Collins originally agreed with Katz, that Reich exhibited the symptoms of Dysthymia. Dr. Collins, however, strongly disagreed with how Reich was being treated, opining that medication, a better diet and more vigilance on Reich's part might "cure" Reich of this "common" and "treatable" disorder. Dr. Collins particularly disagreed with Reich's professed need for an emotional support animal and Katz's endorsement of such treatment. When Dr. Collins rendered that first opinion he had all of Reich's medical and therapeutic records before him, as well as the transcript of Reich's EBT. It was only after Reich cross moved for summary judgment that Dr. Collins reconsidered his initial opinion and expressed doubt that Reich was Dysthymic at all. In response to Dr. Collins's revised opinion, Katz modified his own diagnosis, stating that he was always sure Reich had another underlying disorder. He stated that although Reich's Dysthymia had apparently resolved itself, this had only revealed or yielded to an underlying Schizoid disorder. Katz indicated the resolution of the Dysthymia was fairly recent and had occurred well after this case was underway.

The allegations in the complaint are broad enough to encompass DHR's present claim on behalf of Reich, that he has PSD. Dysthymia and PSD are both psychiatric diagnoses. Thus, Reich still maintains that he has a mental/psychiatric disability which

necessitates a reasonable accommodation by the landlord in order for him to use and enjoy his apartment. Katz's Axis II type diagnosis is not, as the landlord claims, completely "new" or a recent fabrication to help Reich's case. As far back as 2002, Katz believed Reich had at least one other disorder in addition to Dysthymia. Katz has described how (in his opinion) mental disorders and personality disorders may be hard to diagnose, not only because they have similar symptoms and mimic one another, but also because a patient's mental and physical health is fluid and evolving, not static.

Regardless of which mental/psychiatric problem Reich actually suffers from at the present time, the symptoms he exhibits, the feelings he claims to have, and the actions he is observed to take (i.e. he is distrustful, he isolates himself and has self destructive habits such as excessive eating, etc.) appear to persist. Even defendant's own expert does not opine that Reich is a well adjusted adult. In opposition to the landlord's motion for summary judgment dismissing the complaint, DHR has shown that, contrary to the landlord's position, plaintiff is not raising an entirely new theory of disability thereby expanding the scope of liability. The revised diagnosis is based upon evidence DHR provided defendant in discovery. That evidence was readily available to defendant's expert when he prepared his opinion and defendant has failed to show prejudice or surprise. Therefore, plaintiff will be allowed to conform the pleadings to the proof pursuant to CPLR 3025 [c].

A separate but closely related issue is whether Reich suffers from a "disability" as that term is used in the NYSHRL. The NYSHRL is applied consistently with the Federal civil rights laws (Rosenblatt v. Bivona & Cohen, P.C., 946 F.Supp. 298 [SDNY

1996]). The New York courts require the same standard of proof for claims brought under NYSHRL as for those brought under Title VII (see Johnson v. Levy, 812 F.Supp.2d 167 [E.D.N.Y. 2011]). Although the elements of a *prima facie* case for ADA claims are also applicable to claims under the NYSHRL, New York State's definition of "disability" is broader and more generous than that in the ADA (Doe v. Deer Mountain Day Camp, Inc., 682 F.Supp.2d 324, 350 [SDNY 2010] (internal citations omitted); Davis v. Bowes, 159 F.3d 1346 [2nd Cir (N.Y.) 1998] *n.o.r.*). Unlike the ADA, NYSHRL's definition of disability "covers a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future" (Davis v. Bowes, 159 F.3d 1346 [2nd Cir (N.Y.) 1998] (*n.o.r.*) citing State Div. of Human Rights v. Xerox Corp., 65 N.Y.2d 213 [1985]).

This is not a summary proceeding to review DHR's probable cause determination. However, in finding probable cause of an unlawful discriminatory practice, DHR necessarily made a preliminary administrative assessment of Reich's claim that he suffers from a "disability" within the meaning of the statute. That preliminary assessment is entitled to some deference and, in the absence of conclusive, evidence in admissible form to the contrary, this alone raises triable issues of fact that preclude the grant of summary judgment to the defendant and, therefore, that motion is denied.

In support of his cross motion for a declaration that he suffers from a disability, Reich provides all his medical and therapeutic data, such as lab reports, Katz's initial

diagnostic impression and his therapy notes. He also provides his own deposition testimony describing what he feels and what life is like for him. Reich has been in treatment for mental and physical ailments for several years. No triable issue of fact is raised by the landlord that Dysthymia or PSD are not impairments which are "demonstrable by medically accepted clinical or laboratory techniques..." (State Div. Hum Rts v. Xerox Corp., 65 NY2d 213 [1985]).

Although in opposition to the cross motion the landlord contends that the medical and other evidence that Reich has provided is inadequate, the landlord has not clearly articulated in what way. Unlike the complainant in One Overlook Ave. Corp v. NYS Div of Human Rights (8 AD3D 286 [2nd Dept 2004] *lv den* 5 NY3d 714 [2005]) ("One Overlook"), Reich has provided medical and psychological evidence in support of his claim of a disability. The court in One Overlook did not decide that Dysthymia or some other mental impairment or personality disorder is not a "disability" within the meaning of the NYSHRL. Comments by Dr. Collins, that Reich's problems are "common" and "treatable" via conventional methods, has no bearing on whether Reich suffers from "a physical, mental or medical impairment ... which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques ... " (Exec Law § 292). Dr. Collins does, however, question whether Reich has the disorder Katz has diagnosed him with and he challenges Katz's methodology. This disagreement between the professionals raises triable issues of fact that defeat the cross motion as well and it is denied.

Exec Law § 296.18 [2] imposes a requirement that a person with a disability requesting an accommodation must show that "such accommodation may be necessary to afford said person with a disability equal opportunity to use and enjoy a dwelling..." The accommodation sought by Reich is a dog. Landlord seeks summary judgment on the issue of whether the dog is "actually necessary" for Reich to "use and enjoy" his apartment. According to the landlord, Reich can manage just fine without Maddy, she offers little relief from his symptoms, an emotional support pet is an unconventional treatment for his disability, assuming it exists, and he is not using Maddy in a way that other persons with support animals use their pets. For example, Reich leaves Maddy at home and does not take her to work with him.

Whether a requested accommodation is required is "highly fact-specific, requiring case-by-case determination"² (Hubbard v. Samson Management Corp., 994 F.Supp. 187, 190 [SDNY 1998]). Furthermore the nature of the accommodation is framed by the nature of the particular handicap or disability alleged (Hubbard v. Samson Management Corp. supra). Given the dispute about Reich's disability, any decision about whether Maddy is actually necessary for him to "use and enjoy" his apartment and whether the accommodation requested is reasonable cannot be decided at this time. Therefore, the landlord's motion for summary judgment on these issues is denied.

²Although this case involves the Fair Housing Act, as previously indicated, the New York courts require the same standard of proof for claims brought under NYSHRL as for those brought under Title VII (see Johnson v. Levy, 812 F.Supp.2d 167 [E.D.N.Y. 2011]).

In its answer and motion for summary judgment, the landlord seeks legal fees against DHR. Exec Law § 297.10 provides that legal fees may be assessed against DHR only if the complainant is employed by DHR and the complaint is against DHR in its capacity as employer. Since those are not the facts of this case, DHR's motion for summary judgment dismissing the landlord's request for legal fees is granted. That relief is, therefore, severed and dismissed.

Conclusion

The landlord's motion for summary judgment is denied in all respects. DHR's cross motion for partial summary judgment is granted only to the extent that the request for legal fees in the answer is severed and dismissed. The cross motion is otherwise denied. DHR's request to amend its complaint to conform to the proof is, however, granted and the complaint is deemed so amended.

According to SCROLL, this case is scheduled for mediation on June 4, 2012. Once that is completed, this case is ready to be tried since discovery is complete and the Note of Issue was filed. Plaintiff shall serve a copy of this order on the clerk in the Office of Trial Support so the case can be scheduled for trial.

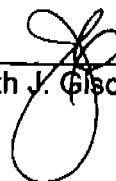
Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
June 1, 2012

So Ordered:

Hon. Judith J. Gische, JSC



FILED
JUN 05 2012
NEW YORK
COUNTY CLERK'S OFFICE