Orioles v Kaplan
2013 NY Slip Op 32052(U)
August 26, 2013
Supreme Court, Suffolk County
Docket Number: 12-34039
Judge: Peter H. Mayer

SHORT FORM ORDER

INDEX No. 12-34039

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3-28-13
ADJ. DATE 5-7-13
Mot. Seq. # 001 - MG; CASEDISP

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DEBORAH M. ORIOLES and DENNIS ORIOLES,

Plaintiffs,

- against -

SCOTT KAPLAN and SDK PET CORP.,

Defendants.

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MAZZEI & BLAIR, ESQS.
Attorney for Plaintiffs
9B Montauk Highway
Blue Point, New York 11715

JACKSON LEWIS LLP
Attorney for Defendants
58 South Service Road, Suite 410
Melville, New York 11747

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated March 1, 2013, and supporting papers 1 - 9 (including Memorandum of Law dated March 1, 2013); (2) Affidavit and Affirmation in Opposition by the plaintiff, dated April 15, 2013 and April 16, 2013 respectively, and supporting papers 10 - 20; (3) Other Reply Memorandum dated May 6, 2013; 21- 22 (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by the defendants for an order pursuant to CPLR 3211 (a) (2) and (8) dismissing the complaint is granted.

The plaintiff Deborah M. Orioles (plaintiff) was formerly employed by the defendants Scott Kaplan (Kaplan) and SDK Pet Corp. (SDK) as an office manager. Kaplan is a licensed veterinarian, and owner of SDK, his veterinary practice. The plaintiff was employed by the defendants from 1993 until September 14, 2010, when she was terminated. On or about November 10, 2010, the plaintiff filed a complaint with the New York State Division of Human Rights (DHR) alleging that she was terminated without cause and discriminated against because of a medical disability. It is undisputed that the plaintiff was diagnosed with Lupus in approximately 1997.

Thereafter, upon investigation of the complaint submitted by the plaintiff, and after opportunity for review of related information and evidence by the named parties, the DHR issued a Determination and Order After Investigation dated March 28, 2013, under Case No. 10145441, finding that "there is NO PROBABLE CAUSE to believe that the respondent has engaged in or is engaging in the unlawful discriminatory practice complained of." Said Determination further informed plaintiff that she had the right to appeal the decision, by filing a notice of petition, and petition, with the Supreme Court of the State of New York, in the County where the alleged unlawful discriminatory practice took place, within sixty (60) days after service of the determination, with a copy of the notice of petition, and petition to all parties including the general counsel of DHR.

Prior to the written determination by DHR, the plaintiff commenced this action by the filing of a summons and complaint on November 7, 2012. On or about January 21, 2013, the plaintiff served an amended complaint in this action.[1] In her amended complaint, the plaintiff sets forth five causes of action. In the first and second causes of action, the plaintiff alleges that the defendants discriminated against her on the basis of disability and other violations of the New York State Human Rights Law (HRL). The third and fourth causes of action respectively allege that the defendants were negligent in compelling her to perform work outside the scope of her job description which exposed her to injury, and were negligent per se in violation of "several parts of the New York State Code, Rules and Regulations ..." The fifth cause of action, is a derivative cause of action on behalf of the plaintiff Dennis Orioles.

New York Executive Law 296 [2] prohibits discrimination by an employer, and also prohibits the employer from retaliating against an employee for opposing any practices forbidden under the Human Rights Law. Pursuant to Executive Law 297 (9), often called the election of remedies provision, "any person claiming to be aggrieved by an unlawful discrimination practice shall have a cause of action in any court of appropriate jurisdiction for damages ... unless such person had filed a complaint hereunder [with the State Division of Human Rights] or with any local commission of human rights" (*see also* ***York v Association of the Bar of the City of New York***, 286 F3d 122, 127 [2d Cir 2002]). Thus, an aggrieved individual must make "a choice of instituting either a judicial or administrative proceeding. "[She] may not, however, resort to both forums; having invoked one procedure, [she] has elected [her] remedies" (***Koster v Chase Manhattan Bank, N.A.***, 609 F Supp 1191, 1196 [SD NY 1985]). Once an employee files such a complaint, the courts are divested of jurisdiction and dismissal of a subsequent action is required (***Emil v Dewey***, 49 NY2d 968, 428 NYS2d 887 [1980]; *see also* ***Hirsch v Morgan Stanley & Co.***, 239 AD2d 466, 657 NYS2d 448 [2d Dept 1997]; ***Brown v Wright***, 226 AD2d 570, 641 NYS2d 125 [2d Dept 1996]; ***Matter of James v Coughlin***, 124 AD2d 728, 508 NYS2d 231 [2d Dept 1986]). There is an exception to the rule where the agency dismisses the complaint on the ground of administrative convenience (***Emil v Dewey***, *supra*; ***Brown v Wright***, *supra*; ***Kordich v Povill***, 244 AD2d

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[1] The computerized records maintained by the Court indicate that the plaintiff has not made a motion for leave to amend her complaint, and the records do not reflect that the parties have executed a stipulation in that regard. However, the defendants address their motion solely to the amended complaint herein.

[2] Executive Law §§ 290 - 301 comprise Article 15 of the Executive Law, and is known as the Human Rights Law.

122, 676 NYS2d 331 [3d Dept 1998]).

The defendants now move for an order dismissing the complaint against them on the grounds that the Court lacks subject matter jurisdiction and that it fails to state a cause of action. CPLR 3211 (a) (2) provides "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the court has no jurisdiction of the subject matter of the cause of action...." Here, the defendants seek dismissal of the action on the ground that the plaintiff is barred from prosecuting an action in the courts after electing to bring her complaint before the DHR. It is undisputed that the claims alleged in the first and second causes of action in the complaint are identical to the facts and circumstances asserted in the complaint filed against the defendants with DHR. After investigation, the DHR issued its determination which found on the merits there was no probable cause to support plaintiff's claims of discrimination and dismissed the complaint. The dismissal was not based on the grounds of administrative convenience or untimeliness. Therefore, the Court finds that the plaintiff made an election of remedies by the filing of her complaint with DHR, which alleged identical facts and circumstances as contained in the instant complaint. In addition, having failed to bring a proceeding to test whether the DHR determination was arbitrary or capricious in the Supreme Court of Suffolk County, within sixty days of receipt of the decision (*see* Executive Law 298; CPLR 7801 et seq.), the plaintiff waived the right to contest that determination.

In opposition, the plaintiff contends that "the unique circumstances" of this matter permit the plaintiff to plead these two causes of action and bring the claim in both the supreme court and the DHR. The basis for the assertion is that the DHR took approximately 28 months to render its determination, that the New York State Unemployment Insurance Appeal Board found that the plaintiff was not discharged for cause, and that it appears that DHR did not review certain additional information provided by the plaintiff at the DHR's request before issuing its decision. However, the plaintiff does not cite any authority in support of her contention that these facts, separately or collectively, permit the Court to exercise jurisdiction in this plenary action. Accordingly, the first and second causes of action alleging discrimination against the defendants are dismissed with prejudice pursuant to CPLR 3211 (a) (2).

The Court now turns to that branch of the defendants' motion which seeks to dismiss the complaint for failure to state a cause of action on the ground that the plaintiff's third and fourth causes of action are barred by the Workers' Compensation Law. Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v Martinez***, *supra*; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]; ***Thomas McGee v City of Rensselaer***, 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer County 1997]). Upon

a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui Pak Hoi***, 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

The third and fourth causes of action set forth in the complaint sound in negligence and negligence per se respectively. A review of the subject causes of action reveals that the plaintiff alleges, in summary, the following facts: that she was compelled to perform duties outside of her job title, that Kaplan violated the New York State Code, Rules and Regulations (Regulations) when he compelled her to do said work, and that as a result of being compelled to do said work she was injured by a pit bull in July 2010. The plaintiff further alleges that, by virtue of his license as a veterinarian, Kaplan is held to a higher standard of care, that she was within the class of persons that the Regulations are intended to protect, that the defendants are liable for her injuries under the theory of negligence per se, and that the Workers' Compensation Law is not applicable because her injuries were a "foreseeable consequence" of Kaplan's actions, which were "reckless."

The defendants now move to dismiss the subject causes of action as barred by the Workers' Compensation Law. WCL § 11 provides, in pertinent part:

> The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom ...

It is undisputed that the plaintiff was employed by the defendants at the time of her alleged injuries. Here, the sole question before the Court is whether the plaintiff's only remedy for her alleged injuries lies within the Workers' Compensation Law. As a general rule, the receipt of workers' compensation benefits is the exclusive remedy that a worker may obtain against an employer for losses suffered as a result of an injury sustained in the course of employment (*see* WCL §§ 11, 29 [6]; ***Reich v Manhattan Boiler & Equip. Corp.***, 91 NY2d 772, 779, 676 NYS2d 110 [1998]; ***Gaynor v Cassone Leasing***, 79 AD3d 967, 914 NYS2d 241 [2d Dept 2010]; ***Slikas v Cyclone Realty***, 78 AD3d 144, 908 NYS2d 117 [2d Dept 2010]; ***Dulak v Heier***, 77 AD3d 787, 909 NYS2d 743 [2d Dept 2010]).

It is well settled that recovery for accidental injuries arising out of and in the course of employment, including injuries caused by an employer's negligence, is governed by the Workers' Compensation Law (***Burlew v American Mut. Ins. Co.***, 63 NY2d 412, 482 NYS2d 720 [1984]; ***Naso v Lafata***, 4 NY2d 585, 176 NYS2d 622 [1958]; ***Miller v Huntington Hosp.***, 15 AD3d 548, 792 NYS2d 88 [2d Dept 2005]). However, an injured employee may avoid the bar to recovering damages from an employer if he or she can prove that the injury was intentionally perpetrated by the employer or at the direction of the employer (***Acevedo v Consolidated Edison Co. of N.Y.***, 189 AD2d 497, 596 NYS2d 68 [1st Dept 1993]; *see also* ***Miller v Huntington Hosp.***, 15 AD3d 548, 792 NYS2d 88 [2d Dept 2005]; ***Reno v County of Westchester***, 289 AD2d 216, 734 NYS2d 464 [2d Dept 2001]; ***Fucile***

v Grand Union Co., 270 AD2d 227, 705 NYS2d 377 [2d Dept 2000]; ***Pitter v Gussini Shoes, Inc.***, 206 AD2d 464, 614 NYS2d 568 [2d Dept 1994]; ***Orzechowski v Warner-Lambert Co.***, 92 AD2d 110, 460 NYS2d 64 [2d Dept 1983]). "In order to constitute an intentional tort, the conduct must be engaged in with the desire to bring about the consequences of the act. A mere knowledge and appreciation of a risk is not the same as the intent to cause injury. . . . A result is intended if the act is done with the purpose of accomplishing such a result or with the knowledge that to a substantial certainty such a result will ensue" (***Finch v Swingly***, 42 AD2d 1035, 1035, 348 NYS2d 266, 268 [4th Dept 1973]).

Here, to the extent that the plaintiff alleges negligence on the part of the defendants, the third and fourth causes of action are barred by the Workers' Compensation Law. To the extent that the fourth cause of action can be read to allege an intentional tort, it is likewise barred. Initially, it is barred because the complaint fails to allege facts which indicate that the defendants desired to bring about the plaintiff's injuries or otherwise knew with a substantial certainty that said injuries would result, and additionally, because any cause of action for intentional tort would be barred by the statute of limitations. It is undisputed that the plaintiff was injured by a pit bull in May or July 2010.[3] This action was commenced by the filing of a complaint on November 7, 2012, more than one year after the plaintiff suffered her alleged injuries. Thus, any cause of action for intentional tort would be barred by the statute of limitations (CPLR 215 [3]; ***Yong Wen Mo v Gee Ming Chan***, 17 AD3d 356, 792 NYS2d 589 [2d Dept 2005]; ***Gallagher v Directors Guild of Am.***, 144 AD2d 261, 533 NYS2d 863 [1st Dept 1988]).

The plaintiff's remaining contentions are without merit. It has been held that a regulation does not afford a putative plaintiff a cause of action for negligence per se, and that violation of a statute is required (***Dashinsky v Santjer***, 32 AD2d 382, 301 NYS2d 876 [2d Dept 1969]). In addition, the plaintiff does not cite to any authority which would establish that Kaplan's license as a veterinarian requires a higher duty of care in his dealings with the public or his employees.

Inasmuch as the third and fourth causes of action which seek damages on behalf of the plaintiff must be dismissed, the fifth cause of action, which is a derivative cause of action on behalf of the plaintiff's husband, must also be dismissed (***Reich v Manhattan Boiler & Equip. Corp.***, 91 NY2d 772, 676 NYS2d 110 [1998]; ***Rauch v Jones***, 4 NY2d 592, 176 NYS2d 628 [1958]).

Accordingly, the defendants' motion to dismiss the complaint on the grounds that the Court lacks subject matter jurisdiction and for failure to state a cause of action is granted.

Dated: 8/26/13

PETER H. MAYER, J.S.C.

[3] In her affidavit in opposition to the defendants' motion the plaintiff alleges that she was injured in May 2010. In her verified amended complaint, the plaintiff alleges that she was injured in July 2010.