Perez v County of Rensselaer, N.Y.
2018 NY Slip Op 33547(U)
August 10, 2018
Supreme Court, Albany County
Docket Number: 905364-16
Judge: L. Michael Mackey

5364-18STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

NELLI PEREZ, AS ADMINISTRATOR OF THE ESTATE OF GERARD WIERZBICKI,

Plaintiff,

-against-

COUNTY OF RENSSELAER, NEW YORK; LAURA BAUER, in her individual and official capacity as Director of Probation of Rensselaer County; and JOHN DOES(S) And JANE DOES(S),

Defendants.

DECISION AND ORDER

Received 8/29/18 Lopez

Index # 905364-16

(Albany County Supreme Court, Motion Term)
(Justice L. Michael Mackey, Presiding)

APPEARANCES:

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Mackey, J.:

Plaintiff Nelli Perez ("plaintiff") is the administrator of the estate of Gerard Wierzbicki ("decedent" or "Wierzbicki"), who commenced an employment discrimination claim in the United States District Court for the Northern District of New York ("District Court") by filing

initiatory papers on or about July 29, 2014. Those claims against defendants County of Rensselaer, Laura Bauer in both her individual and official capacity as Director of Probation of the county, and various John Does (collectively "defendants") alleged violations of Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, 42 U.S.C. §1983 and the New York State Human Rights Law. Wierzbicki was a probation officer employed by the county probation department. In July 2013, two senior probation officer positions, required to be filled in accordance with the New York State Civil Service Law, opened in the probation department. Though Wierzbicki achieved the highest score on the exam, he did not receive a promotion, which instead was awarded to a younger female probation officer who scored lower but was still eligible for promotion according to civil service rules. Before filing the federal action, Wierzbicki complained to the U.S. EEOC and ultimately obtained a "right to sue" letter on April 29, 2014.

Defendants filed a pre-answer motion to dismiss September 19, 2014 pursuant to Federal Rule of Civil Procedure 12(b)(6) and for summary judgment pursuant to FRCP 56. In an August 12, 2015 decision, defendants' motion for summary judgment was denied as premature and the motion to dismiss was granted in part. Specifically, District Court held that any claims based on employment actions before 2013 were time-barred, the NYSHRL claims against the county and Bauer in her official capacity were barred, claims against Bauer in her individual capacity under Title VII or the ADEA were barred, and claims under the New York State Constitution were barred. Wierzbicki's remaining claims for Title VII gender discrimination against the county, ADEA age discrimination against the county, §1983 age and gender discrimination against the county, Bauer and Doe defendants, and state gender and age

discrimination against Bauer (in her individual capacity) and the Doe defendants survived the FRCP 12(b)(6) motion.

The parties completed written discovery and depositions. Written discovery included Wierzbicki's answers to interrogatories which particularized alleged discriminatory acts; these answers, dated February 5, 2016, included his claim that he was wrongfully passed over for promotion in 2015 that went instead to a younger, female applicant Kara Wohlleber. Wierzbicki sought leave to amend his complaint related to the 2015 promotions or alternatively a stay to allow time to file an EEOC complaint related to the 2015 promotions. Over defendants' opposition, Wierzbicki was permitted to move for leave to file an amended complaint. Wierzbicki did not move to amend the complaint, but instead filed a new EEOC complaint. The parties dispute the legal rationale for seeking a "new" EEOC right-to-sue letter relative to the 2015 promotions.

During discovery conducted after the 2015 promotions allegedly aggrieved Wierzbicki, Bauer was deposed about all promotions in the department after 2009, including the 2015 promotions, and defendants provided redacted personnel files of each employee who received a promotion "over" Wierzbicki, including the files of two younger female employees promoted in 2015. Defendants again filed a motion for summary judgment under FRCP 56 on August 31, 2016 which addressed, *inter alia*, the 2015 promotions (i.e. the same promotions challenged in the instant state court action). In his papers filed October 3, 2016 in opposition to defendants' summary judgment motion, Wierzbicki also addressed the 2015 promotions.

On September 12, 2016, approximately twelve days after defendants moved for summary judgment dismissing the federal action, Wierzbicki commenced the instant action in

Albany County Supreme Court by filing a summons and complaint. The parties, transactions, and relief demanded in the state court action are identical to the federal action except that the complaint filed in state court also expressly includes a claim related to the 2015 department promotions that Wierzbicki claims were also wrongfully granted to other employees.

In October 2016, defendants timely moved, before joinder of issue, for dismissal of the instant state court action on various grounds, including that this matter should be dismissed pursuant to CPLR 3211 (a) (4) based upon the pending federal court action, that this action was subject to dismissal under principles of *res judicata* or collateral estoppel, or alternatively that defendants were entitled to summary judgment dismissing the complaint. Through no fault of the parties, the disposition of the motion has been delayed or deferred, first by reassignment of this case, then due to the untimely and regrettable death of Mr. Wierzbicki on January 31, 2017, after which plaintiff was substituted as the representative of her late husband's estate on April 10, 2018. Thereafter, the matter was held in abeyance pending disposition of defendants' FRCP 56 motion for summary judgment filed August 31, 2017, which was decided by District Court (Sharp, J.) on or about July 13, 2018. For reasons set forth below, the Court grants defendants' motion to dismiss on the grounds there is another action pending between the same parties for the same cause of action in a court of the United States pursuant to CPLR 3211 (a) (4).

A trial court has broad discretion in considering whether to dismiss an action because another action is pending between the same parties for the same relief under CPLR 3211(a)(4). *Whitney v. Whitney*, 57 NY2d 731 (1982). Where another action is pending, as a matter of comity, courts seek to avoid the potential for conflicts that might result from rulings issued by

courts of concurrent jurisdiction. *White Light Productions, Inc. v. On the Scene Productions, Inc.* 231 AD2d 90, 93 (1st Dep't 1997). A court may dismiss an action under CPLR 3211(a)(4) where there is a substantial identity of the parties and causes of action, so long as the actions are "sufficiently similar" and they seek the same or substantially the same relief. *Cherico, Cherico & Associates v. Midollo,* 67 AD3d 622 (2d Dep't 2009) (citations omitted). The most important element is that "both suits arise out of the same subject matter or series of wrongs." *Id.* "If the only difference between the two actions is that the relief demand differs, but it appears that the relief demanded in either action could by amendment be demanded in the other, the motion to dismiss should be granted. If the action moved upon involves more than the other one does, however, and the other can't be made to do as much, the dismissal should be denied." *Siegel, New York Practice §262 (Connors 6th ed.), Other Action Pending; Paragraph 4.* In determining whether two causes of action are the same, the court should consider whether both suits arise out of the same actionable wrong (or series of wrongs) and whether there is any practical reason for two actions rather than a single action seeking the remedy. *Rinzler v. Rinzler,* 97 AD3d 215 (3d Dep't 2012). "Where there are two pending actions involving the same parties and the same causes of action, the court in which the first action was commenced is the one that ought to adjudicate the dispute." *John R. Higgit, Supp. Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3211:16,* citing *City Trade & Industries, Ltd. v New York Central Jute Mills Co.*, 25 NY2d 49 (1969).

Comparison of the complaint in the earlier-filed, federal action to the complaint in this later-filed state action reveals that the parties and causes of action are substantially the same (and perhaps even identical), except that plaintiff claims here that Wierzbicki is entitled to

money damages due to alleged discrimination relating to a 2015 promotion while the earlier federal action was pending. The parties offer opposing arguments about this distinction. Defendants claim that plaintiff's causes of action in District Court all alleged a continuing series of wrongful denials of promotions from 2009-2013 (through the time of filing) such that the alleged denial of promotion in 2015 is but one additional transaction subject to adjudication in the earlier filed federal action. Defendants argue that District Court is the proper and preferable venue for adjudication of all claims related to withheld promotions and cite authority holding that an employment-discrimination plaintiff need not file new EEOC complaints for continuing violations or post-commencement adverse employment actions that are reasonably related to the original filing. *See, Shah v. N.Y.S. Dep't of Civil Serv.*, 168 F3d 610, 613 (2d Cir. 1999) (subsequent claims "reasonably related" to claims filed with EEOC are not subject to exhaustion of administrative remedies); *Almendral v. NYS Office of Mental Health,* 743 F2d 963 (2d Cir. 1984); *Kirkland v. Buffalo Board of Education*, 622 F2d 1066, 1068 (2d Cir. 1980) (second EEOC right-to-sue letter not required to allow courts to consider new discriminatory acts, related to original EEOC complaint, that occur during pendency of first complaint). Thus, defendants contend Wierzbicki was permitted to amend his federal action to incorporate the 2015 allegations without first exhausting administrative remedies with the EEOC, such that plaintiff's arguments concerning the dissimilarity of the causes of action or relief sought lack merit.

Plaintiff argues that the alleged adverse employment action in 2015 constitutes a separate wrong that Wierzbicki, at his election, may litigate in a second state court suit despite the pending earlier-filed federal action in which the 2015 conduct was addressed in discovery and motion practice. She further contends that while District Court (Stewart, M.J.) granted

leave to move to amend pleadings to incorporate the 2015 transaction, assertion of such claims was premature because the EEOC had not yet issued a right-to-sue letter; she also claims that Wierzbicki was entitled to elect strategically to proceed separately in a later suit without risking issue or claim preclusion.

These competing contentions implicate one of the purposes underlying CPLR 3211(a)(4), i.e. minimizing the potential for inconsistent judicial rulings by courts of concurrent jurisdiction. Without reaching the merits of the underlying claims and defenses, which have been litigated without final or complete resolution in federal court, the Court finds that the 2015 employment action claims are substantially the same as the 2009-2013 transactions at issue in the federal claim and that the federal action, by amendment, allowed plaintiff to demand relief for the 2015 transaction. The dispositive motion papers filed in District Court reveal that the 2015 promotions were addressed the earlier-filed federal action, regardless of the posture of any EEOC administrative complaint. The extent to which plaintiff actually sought to litigate the newer claims in the pending federal action may, as she claims, alter analysis of a motion to dismiss on *res judicata* claims, but it will not militate in favor of preserving the later-filed state court action, particularly when plaintiff (or decedent) litigated the 2015 promotions and also could have earlier filed the 2016 EEOC complaint, thereby satisfying any arguable condition precedent to amending the federal employment discrimination action. The Court therefore grants defendants' motion to dismiss this action pursuant to CPLR 3211(a)(4) because there is another, earlier action pending between the same parties for essentially the same cause of action.

While dismissal of the complaint pursuant to CPLR 3211(a)(4) obviates the need to address defendants' alternative grounds for dismissal, the Court notes that summary judgment may not be granted in these circumstances where issue has not been joined by defendants' answer. CPLR 3212 (a); *City of Rochester v. Chiarella*, 65 NY2d 92 (1985). In the absence of any showing that both parties deliberately chartered a procedural course that treats defendants' motion as if issue had been joined, denial of the summary judgment motion is required. *See Kline v. Town of Guilderland*, 298 AD2d 741 (3d Dep't 2001).

Likewise, the complaint is not subject to dismissal *presently* on *res judicata* or collateral estoppel grounds. Under the doctrine of *res judicata*, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. *See Parker v. Blauvet Volunteer Fire Co.*, 93 NY2d 343, 347 (1999). Under the doctrine of collateral estoppel, or issue preclusion, a party may not relitigate an issue in a later action if the same issue was raised, necessarily decided, and material in the first action, and plaintiff had a full and fair opportunity to litigate the issue in the earlier action. *Id.* at 349. When defendants timely moved to dismiss the state court complaint, their dispositive motion was only recently filed in District Court, such that there was no valid, final order when defendants moved to dismiss this action. This Court is now aware that District Court granted summary judgment dismissing some, but not all, of plaintiff's claims, such that even now the absence of finality militates against dismissal on issue or claim preclusion grounds.

Finally, defendants' motion for an order pursuant to CPLR 8303-a is denied because movants have not demonstrated any of the prerequisites under CPLR 8303-a (c)(i) or(ii). Assuming, without deciding, that this rule applies to employment discrimination and statutory

causes of action, the Court does not conclude that the claims asserted here are frivolous. Though plaintiff may indeed have been motivated by litigation strategy to file this action rather than amend the pending federal action, the arguable ambiguity surrounding Wierzbicki's right to elect remedies is sufficient for the Court to conclude the claim was not frivolous.

Accordingly, defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(4) is hereby **GRANTED** and all other relief sought by defendants' motion is **DENIED WITHOUT PREJUDICE.**

SO ORDERED.

ENTER.

Dated: Albany, New York
August 10, 2018

L. Michael Mackey
L. MICHAEL MACKEY
Supreme Court Justice

Received on August 29, 2018
L. Michael Mackey

9/13/18

This constitutes the Decision and Order of the Court. The original Decision and Order is being transmitted to the Albany County Clerk for filing and entry. Upon such entry, defendants' counsel shall promptly serve notice of entry on plaintiff's counsel pursuant to 22 NYCRR 202.5-b[h][1], [2].

9/18/18

Papers Considered:

1. Defendant's Notice of Motion, Affirmation of Shawn Brousseau, Esq. in Support with Exhibits A-K and Memorandum of Law in Support filed October 7, 2016;
2. Affirmation in Opposition of A.J. Bosman, Esq. with Exhibits A-G and Memorandum of Law in Opposition filed October 21, 2016;
3. Defendants' Reply Memorandum of Law filed October 27, 2016.