Joseph v City of New York
2020 NY Slip Op 33955(U)
December 1, 2020
Supreme Court, New York County
Docket Number: 151340/2020
Judge: Lyle E. Frank

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** 52

Justice

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JANICE JOSEPH

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

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INDEX NO. 151340/2020

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion Sequence No. 002) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for DISMISSAL.

In this action, plaintiff Janice Joseph sues defendant The City of New York for disability discrimination, under both the New York State Human Rights Law (SHRL) and the New York City Human Rights Law (CHRL).[1] The original complaint is dated February 5, 2020. Plaintiff's affidavit of service indicates that plaintiff served defendant on March 20, 2020. Defendant withdrew its initial motion to dismiss by a stipulation which allowed plaintiff to amend her complaint (NYSCEF Doc. No. 10). Plaintiff filed her amended complaint on July 31, 2020 (NYSCEF Doc. No. 11). Subsequently, defendant filed a motion to dismiss the amended complaint under CPLR § 3211 (a) (7) (NYSCEF Doc. No. 13). This motion, sequence number 002, is currently before the court. For the reasons below, the court denies the motion.

FACTUAL ALLEGATIONS

[1] The Court would like to thank Beth Herstein, Esq. for her assistance in this matter.

For the purpose of this motion, the court accepts all assertions in the amended complaint as true and interprets the pleading liberally (*see Alden Global Value Recovery Master Fund, L.P. v Key Bank N.A.*, 159 AD3d 618, 621-622 [1st Dept 2018] [*Alden*]).

Plaintiff, who is deaf and relies on American Sign Language (ASL), worked for defendant's Department of Environmental Protection (DEP) from 1978 until March 2018. During this time, plaintiff rose from the position of intern to that of Clerical Associate Level II (Clerical II). In this latter role, plaintiff served as a messenger, helped maintain the mail-copy room, delivered supplies, maintained records of supply requests, and helped to store and archive documents, either preparing them for shipment to DEP's storage facility or shredding them when they were deemed appropriate for disposal.

After years of experience at the Clerical II level, plaintiff sought a position as Clerical Associate Level III (Clerical III). However, she was hindered in her efforts by the fact that group meetings were oral and she "was only rarely provided an [ASL] Interpreter despite her continued, ongoing requests during all thirty-nine years of her employment" (NYSCEF Doc. No. 11, ¶ 17). Further, plaintiff states that her superiors at DEP retaliated against her because of her disability and her regular requests for accommodation (RFAs) –among other things, by denying her raises and promotions, giving her more difficult and more physically strenuous assignments, and inducing her "to sign agreements that were not explained to her and that she did not understand" (*id.*, ¶ 21).

Plaintiff also asserts that she could not participate in active shooter trainings or in seminars about conflicts of interest, office ergonomics, workplace violence, and diversity that took place in 2017 and 2018, among other years. Plaintiff's supervisor's requests for an ASL interpreter on plaintiff's behalf were denied repeatedly. The supervisor eventually asked that she

be trained in ASL instead, but this request also was denied. Plaintiff was unable to participate in all of the quarterly "All Hands" meetings in 2017, 2018, and prior years, because "there were no offers of an interpreter to enable her to follow or participate in the meetings, despite repeated requests before each quarterly meeting" (*id.*, ¶ 25). This effectively excluded her from the meetings and limited her ability to improve as a worker and form bonds with the rest of the staff.

In July 2017, plaintiff and her supervisor met with the department's human resources director to discuss the frequent failures to provide her with an ASL interpreter and the impact this had on her job aspirations. DEP did not provide an interpreter for the meeting, which did not resolve the problem but had the effect of increasing plaintiff's workload. The lack of an interpreter at her performance evaluations meant that plaintiff's supervisor could not effectively evaluate and assist her. This last problem also limited plaintiff's ability to understand her retirement options.

"After years of extreme emotional distress and frustration, Plaintiff retired, feeling that she had no other choice in order to protect her own health and well-being. This constructive termination was a direct result of Defendant's discriminatory conduct" (*id.*, ¶ 34). Plaintiff gave notice of her retirement. On February 9, 2018, plaintiff had an exit interview. Once again, no interpreter was present. Plaintiff's efforts to have a retirement session with an interpreter and to attend an employee recognition ceremony in 2018 were also thwarted.

Plaintiff's first cause of action, under the SHRL (New York State Executive Law §§ 296 *et seq.*), asserts that plaintiff sustained financial loss as well as emotional strain and trauma due to DEP's discriminatory treatment and to a hostile work environment. Her second cause of action asserts the same injuries under the CHRL (New York City Administrative Code §§ 8-107 *et*

seq.). Plaintiff seeks compensatory damages for her emotional distress, punitive damages, and attorney's fees.

PARTIES' ARGUMENTS

In its motion to dismiss, defendant raises two arguments. The first is that documentary evidence contradicts plaintiff's claims. Defendant's brief states that DEP's Equal Employment Office (EEO) only has evidence of five reasonable accommodation requests (RARs), dated February 22, 2011, December 3, 2015, July 20, 2016, September 30, 2016, and sometime between March 2018 and October 10, 2018. It annexes a copy of the February 22, 2011 request as well as one dated November 17, 2015 (NYSCEF Doc. Nos. 17, 22). In addition, defendant includes several email exchanges which allegedly shows that it accommodated all of plaintiff's requests (NYSCEF Doc. Nos. 18, 19, 21, 23, 24, 25, 26, 27, 28). Additionally, defendant includes plaintiff's DEP training history, which shows that she attended all but three trainings between 2004 and 2015 (NYSCEF Doc. No. 20). Defendant further states that plaintiff only applied for one promotion to Clerk III, in 2015. According to defendant, there were so many applicants that DEP rescinded the posting, rejected all applicants, and used another hiring method in its ultimate search. In support, defendant submits the job posting, a list of applicants, and a document showing that plaintiff was not hired. Citing *Romanello v. Intesa Sanpaolo S.p.A.* (97 AD3d 449, 451 [1st Dept 2012]) and *Nichols v. Memorial Sloan-Kettering Cancer Ctr.* (36 AD3d 426, 427 [1st Dept 2007]), defendant argues that it has demonstrated good faith, thus requiring dismissal.

Defendant's second argument is that a large portion of the complaint must be dismissed as untimely. It notes that the statute of limitations for the SHRL and CHRL claims is three years (citing *Santiago-Mendez v City of New York*, 136 AD3d 428, 428 [1st Dept 2016], citing, among others, CPLR 214 [2]; Administrative Code of City of NY § 8-502 [d]). As the complaint was filed on February 5, 2020, defendant argues that all claims of alleged incidents that occurred prior to February 5, 2017 must be dismissed. According to defendants, only plaintiff's claim relating to DEP's failure to promote her remains. Further, defendant argues that plaintiff cannot allege a continuing violation, because each RFA and each failure to promote is a discrete incident rather than part of a continuing violation.

In opposition, plaintiff states that defendant's motion does not accurately represent the allegations in plaintiff's complaint. She notes that she was unable to fully participate in numerous activities, including her performance reviews, in the numerous instances when she was denied accommodations. Specifically, among other things, she reiterates that the lack of an interpreter at the annual All Hands meetings impacted her ability to gain a promotion, and that she did not get an exit interview with an interpreter present. She notes that under CPLR § 3211 (a) (7), this court must accept the allegations in the complaint as true and afford them a liberal interpretation.

Here, plaintiff contends, the complaint is sufficient to create triable issues of fact and defendant has not provided sufficient documentary evidence to warrant dismissal. She argues that defendant's statement that she only made five RFAs is not conclusive, especially in the face of plaintiff's allegations that her requests were denied on many other occasions. She points out that defendant relies solely on CPLR § 3211 (a) (7) in its motion, and she states that defendant has not shown that she fails to state a cause of action. She argues that "Defendant's record-

keeping, its promotion procedures, and its procedures for requesting reasonable accommodations are all issues to be explored in discovery" and that a deposition of plaintiff will reveal whether she made her own requests or whether a supervisor made them, and whether plaintiff or her supervisor made any of their requests orally and informally (NYSCEF Doc. No. 33, at ¶ 36).

Additionally, plaintiff alleges that she has stated a cause of action under both the SHRL and the CHRL by alleging that she is deaf and uses ASL, by asserting that the violation occurred throughout her employment with DEP, and by claiming that she suffered in her career as well as emotionally due to her treatment. She notes, citing *Cullen v Nassau County Civ. Serv. Comm.* (53 NY2d 492, 496-97 [1981]), that mental anguish and humiliation can support a discrimination claim under the State and City laws, even where the discrimination is unintentional. Moreover, she notes that under the more liberal CHRL, she need only show differential treatment (citing *Mihalik v Credit Agricole Cheuvreux North America, Inc.*, 715 F3d 102, 110 [2d Cir 2013]). Plaintiff states that heightened pleading requirements, such as exist with respect to fraud claims, do not exist here, and that her complaint has satisfied the "fair notice" requirement that is applicable (citing, *e.g.*, *Petit v Department of Educ. of the City of N.Y.*, 177 AD3d 402, 403 [1st Dept 2019]). Finally, plaintiff does not challenge defendant's argument regarding the timeliness of claims for incidents prior to February 5, 2017. Instead, plaintiff argues that this prior history is relevant as background which supports her timely claims. She states that, contrary to defendant's contention, she has set forth numerous incidents of discrimination that took place after February 5, 2017.

In reply, defendant states that plaintiff's reliance on prior incidents as background fails because there are no timely incidents in the complaint, except for the few that defendant has refuted. Even if this were not the case, defendant urges that plaintiff's reference to past

discrimination is too vague and conclusory to support her complaint. Defendant reiterates that its documents, including internal emails, definitively contradict plaintiff's allegations. Further, it argues, plaintiff is trying to bypass the statute of limitations requirement through this misguided argument.

ANALYSIS

Defendant has moved for relief under CPLR § 3211 (a) (7). As stated, for the purposes of this motion, the court accepts the allegations in the complaint as true and interprets the complaint liberally (*see Alden*, 159 AD3d at 621-622). Moreover, it gives plaintiff "the benefit of every . . . favorable inference" and "determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Gottlieb v Wynne*, 159 AD3d 799, 800 [2nd Dept 2018]).

The SHRL applies the same legal standard as the American with Disabilities Act (ADA) (*I.M. v City of New York*, 178 AD3d 126, 135 [1st Dept 2019]). That is, under the SHRL, plaintiff must show that "(1) she is a qualified individual with a disability; (2) that the defendants are subject to one of the [statutes]; and (3) that she was denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or was otherwise discriminated against by defendants, by reason of her disability" (*id.* [internal quotation marks and citation omitted). Further, "the complaint and supporting documentation must set forth factual allegations sufficient to show that, upon the provision of reasonable accommodations, [the employee] could perform the essential functions of [his or] her job" (*Romanello v Intesa Sanpaolo, S.p.A.*, 22 N.Y.3d 881, 884 [2013] [internal quotation marks and citation omitted]).

The CHRL provides even broader protections (*id.* at 884-885). It requires an employer to make reasonable accommodation that allow a disabled person to satisfy the essential requisites of a job, whether the employer knows or should have known about the disability (*id.* at 885). The

CHRL also places the burden on the employer rather than the employee to show that it would have been a hardship to accommodate the disability (*id.*). "'Thus, the employer, not the employee, has the "'pleading obligation'" to prove that the employee "'could not, with reasonable accommodation, satisfy the essential requisites of the job'" (*id.*, [quoting *Phillips v City of New York*, 66 A.D.3d 170, 183 [1st Dept 2009]).[2]

As plaintiff notes, there is no heightened pleading requirement for a discrimination claim (*see Krause v Lancer & Loader Group, LLC*, 40 Misc 3d 385, 393 [Sup Ct, NY County 2013]). Thus, a discrimination complaint survives a CPLR § 3211 motion if it contains allegations that, if true, satisfy the minimal pleading requirements (*see Brathwaite v Frankel*, 98 AD3d 444, 445 [1st Dept 2012]). Further, if a plaintiff satisfies her burden under the SHRL, then her CHRL cause of action also should be sustained (*see I.M.*, 178 AD3d at 135 [stating that if a claim is sustainable under the ADA, it also survives under the SHRL and the CHRL]).

The court rejects defendant's argument that plaintiff has not set forth viable causes of action. As plaintiff states, she has alleged all the elements of a discrimination claim. Indeed, defendant does not challenge that plaintiff, who is deaf, is disabled, that she was qualified for her job, or that defendant is subject to the SHRL and the CHRL. Defendant contests plaintiff's contention that defendant denied her the chance to participate in or benefit from services and training programs, by its failure to accommodate her disability. However, the complaint is replete with statements that plaintiff was denied these benefits and that she sustained damages as a result. The complaint also includes enough specific allegations to support the complaint.

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[2] *Jacobsen v New York City Health & Hosps. Corp.* (22 NY3d 834, 838 [2014]) rejected the ruling in *Phillips* only to the extent that it could "be interpreted as implying that a good faith interactive process is an independent element of the disability discrimination analysis under either the State or City HRL which, if lacking, automatically compels a grant of summary judgment to the employee or a verdict in the employee's favor . . .."

Among other things, it alleges that plaintiff did not receive an ASL interpreter when she attended active shooter trainings, All Hands meetings, and other events with her fellow workers. It contends that this impeded plaintiff's efforts to socialize with her associates and superiors and to gain information critical to the furtherance of her career. The complaint also indicates that plaintiff was not provided with an interpreter at her performance evaluations or at her exit interview. For all these reasons, dismissal is not appropriate under CPLR § 3211 (a) (7).

As plaintiff intimates, defendant's motion fits better within the parameters of CPLR § 3211 (a) (1). Plaintiff argues that the motion should be denied because it relied on the wrong provision of CPLR § 3211. However, the motion and supporting papers gave plaintiff notice of the gist of defendant's argument and enabled her to mount a vigorous opposition based on the alleged documentary evidence. Therefore, the court exercises its discretion, and, in the interest of judicial economy and fairness, it considers the motion (*see Frankel v Stavsky*, 40 AD3d 918, 918-919 [2d Dept 2007]).

"Where the motion to dismiss is based on documentary evidence . . ., the claim will be dismissed only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*M & E 73-75 LLC v 57 Fusion LLC*, 189 AD3d 1, 6 [1st Dept 2020] [internal quotation marks and citation omitted]). Instead of asking whether the complaint states a cause of action, the court must determine whether the evidence shows that plaintiff does not have a valid claim (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, [1st Dept 2014]). The evidence in question must be essentially undeniable and must defeat the claim in its entirety (*see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014]).

Defendant has not shown by documentary evidence that plaintiff's complaint lacks merit as a matter of law. Defendant's documents only relate to the five requests of RFAs that it found in its records, and only one of them was made during the period in question. As plaintiff states, dismissal is inappropriate because she may unearth more RFAs through the discovery process. Also, plaintiff indicates that she and her supervisor did not make all their requests through an RFA. Informal requests are acceptable under the SHRL and the CHRL. Indeed, a request for accommodation "need not mention the statute, or the term reasonable accommodation and need not be in writing" (*Watson v Emblem Health Serv.*, 158 AD3d 179, 182 [1st Dept 2018] [internal quotation marks and citation omitted]). Thus, even if there were no additional RFAs, this would not dispose of plaintiff's case. Plaintiff is entitled to conduct discovery which might reveal more about her employment history – specifically, a complete record of her official and unofficial requests, and the treatment she received in response to them – during the pertinent period.[3]

Further, the cases on which defendants rely to show that they acted on each request in good faith are distinguishable. In *Romanello*, the good faith efforts involved the defendant's efforts to resolve the problem through a "good faith interactive process" with the aggrieved party (*see Romanello*, 97 AD3d at 451). Here, defendant points to internal emails rather than to communications with plaintiff. In *Nichols*, the Court noted, in dicta, that the defendant had provided the requested accommodation, a reduction in work hours (*Nichols*, 36 AD3d at 426).

[3] The court notes that the emails on which defendant relies are insufficient. Although emails can qualify as documentary evidence (*e.g., Kaplan v Conway & Conway*, 173 AD3d 452, 453 [1st Dept 2019]), they do so only if they satisfy the "essentially undeniable" test (*id.*) For example, email correspondence between a plaintiff and a defendant may conclusively establish the existence – or lack of existence – of a contract (*e.g.*, *Langer v Dadabhoy*, 44 AD3d 425 [1st Dept 2007]).

Here, defendant has produced records of only five incidents, while plaintiff has alleged that she asked for an ASL interpreter on numerous occasions.[4]

Defendant's record of plaintiff's training history shows that plaintiff was present at 14 of 17 training sessions between February 18, 2004 and December 31, 2015 (NYSCEF Doc. No. 20). Contrary to defendant's position, this list does not contradict or dispose of plaintiff's argument that she was unable to participate fully in seminars and training sessions in 2017 and 2018. As is clear, these events did not take place during the period in question. It is not clear whether this is a comprehensive or altogether accurate list, moreover. There are three years gaps between many of the sessions, there are three seminars listed for April 5, 2007, and the list does not include several of the seminars and trainings to which plaintiff refers, such as diversity and conflict of interest trainings and "All Hands" meetings. It also is not clear whether plaintiff worked with an ASL interpreter at these events or was able to participate fully. In the line for comments, there is only one note indicating that she took that session with the instructor. There are no other comments on the sheet – specifically, no comments indicating that an interpreter was present.

[4] Defendant also argues that its documents refute plaintiff's contention that defendant discriminated against plaintiff when it did not promote her. Any claim based on plaintiff's Clerical III application is untimely. The court notes, however, that defendant's argument lacks merit. Plaintiff does not argue that the failure to promote her was in itself discriminatory. Instead, the complaint indicates that because of defendant's refusal to provide an ASL interpreter during meetings and trainings, plaintiff was limited in her ability to further her career and, effectively, this "denied [her] the position of Clerical Associate Level III." (NYSCEF Doc. No. 11, ¶ 15). Also, the documentary evidence upon which defendant relies – i.e., the job posting, a redacted list of applicants, and a tracking report that indicates that defendant hired another applicant – is not conclusive (NYSCEF Doc. Nos. 29-31). The memorandum of law, in which defendant gives a nondiscriminatory explanation of the decision to reject plaintiff, does not constitute documentary evidence (*cf. Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [concerning affidavits]).

In addition, the court denies relief on defendant's alternative argument, that the complaint is untimely. Defendant is correct that there is a three-year statute of limitations (CPLR 214 [2]), and that plaintiff refers generally to incidents that occurred more than three years before the filing of the complaint. However, plaintiff's opposition explains that her claims only mention these prior incidents to give context to her allegations of discrimination that occurred after February 5, 2017. Thus, the argument is misplaced. Furthermore, defendant concedes that at least one of the alleged discriminatory acts took place after February 5, 2017. The court points out that, in addition, plaintiff alleges that she requested that interpreters be present at her evaluation sessions, at several trainings in 2017 and 2018, and at meetings relating to retirement options and planning.

For all these reasons and after consideration of all defendant's arguments, the court denies the motion, as the defendant has not shown that dismissal is warranted under CPLR § 3211. Accordingly, it is

ORDERED that the motion is denied.

12/1/2020
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

HON. LYLE E. FRANK J.S.C.

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