Jones v McDonald's Corp.
2021 NY Slip Op 30292(U)
February 1, 2021
Supreme Court, New York County
Docket Number: 154184/2019
Judge: Paul A. Goetz

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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DUSTIN JONES,

Plaintiff,

- v -

MCDONALD'S CORPORATION, MCDONALD'S USA, LLC,EJJ FOOD CORP., PETWIL VIII, INC.

Defendant.

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INDEX NO. 154184/2019

MOTION DATE 05/22/2020, 05/22/2020

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 96, 101

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for DISMISS.

Plaintiff Dustin Jones, who is confined to a wheelchair, alleges that a McDonald's restaurant located at 18 East 18th St., New York, NY, discriminated against him by reason of his disability. The restaurant has no vertical lift or elevator to enable disabled persons to access its top floor. Defendant Petwil VIII, Inc. (Petwil) moves (1) to dismiss the amended complaint, or (2) to dismiss any claims related to the vertical lift, or (3) for summary judgment dismissing the second cause of action insofar as it seeks attorney's fees, costs and expenses related to the dismissed civil action that plaintiff filed against defendants in the United States District Court for the Southern District of New York (motion sequence number 003).

Defendants McDonald's Corporation and McDonald's USA, LLC (collectively, "McDonald's") (1) join in Petwil's motion to dismiss, and/or (2) move to dismiss the claims that are time-barred, the claims that seek to hold McDonald's liable for the acts or omissions of its

premises' prior owners or occupants, and the claim for attorney's fees, costs and expenses related to plaintiff's dismissed federal action (the same federal action referred to in the previous paragraph) (motion sequence number 004).[1]

The parties in the federal case were the same parties as in this case. In the federal case, commenced on April 20, 2018, plaintiff asserted claims under the Americans with Disabilities Act of 1990 (ADA), 42 USC § 12181 *et seq.*; the New York State Human Rights Law (NYSHRL), Executive Law § 296 *et seq.*; the New York Civil Rights Law § 40, the New York City Human Rights Law (NYCHRL), New York City Administrative Code, § 8–107 *et seq.;* and negligence. Plaintiff voluntarily discontinued his negligence and ADA claims with prejudice, and the Court dismissed the state and New York City claims without prejudice (*Jones v McDonald's Corp.*, 2019 US Dist LEXIS 4943 [SD NY, Jan 9, 2019, No. 16-CV-7537 [JPO], Oetken, J.]; NY St Cts Elec Filing Doc No. [NYSCEF] 24).

The amended complaint in this action alleges that defendants discriminated against plaintiff by reason of his disability in violation of the NYSHRL, the NYCHRL, and the Civil Rights Law (NYSCEF 48). The complaint alleges that the McDonald's restaurant has three public levels. The order counter is on the first level where there are no dining tables. The dining tables are on the second and third floors. A staircase provides access to the second and third levels and a mechanical lift provides access between the first level and the second level. There is no way for mobility impaired customers to access the third level.

The amended complaint further alleges that it is possible to provide wheelchair accessible vertical access between the second and third levels of the McDonald's. Before McDonald's premises were created, the building had a passenger elevator serving all three levels. This

[1] Defendant EJJ Food Corp. has not answered or appeared in this action.

passenger elevator was removed and never replaced. Subsequently, in 2015, defendants installed the vertical lift between the ground level and second level. Plaintiff asserts that because the building previously had an elevator that provided access to the second and third floors, under the antidiscrimination laws, defendants were obligated to provide elevator access to each level when they constructed the McDonald's premises.

Plaintiff alleges that he desired and continues to desire to access the entire McDonald's premises, and that he faces a realistic, credible, and continuing threat of discrimination from defendants' non-compliance with the laws prohibiting disability discrimination. Plaintiff seeks injunctive relief, compensatory damages, punitive damages, and the attorney fees, costs, and expenses incurred in the federal case.

Defendants argue that plaintiff lacks standing to maintain this action, that the statute of limitations on plaintiff's claims has lapsed, and that the restaurant satisfies an elevator exemption.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), "the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference. Whether the plaintiff can ultimately establish [his] allegations is not part of the calculus in determining a motion to dismiss" (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [internal quotation marks and citation omitted]). On a motion to dismiss under CPLR 3211 (a) (3), the defendant bears the burden of demonstrating that the plaintiff has no standing to maintain the action (*DLJ Mtge. Capital v Mahadeo,* 166 AD3d 512, 513 [1st Dept 2018]). For its part, "the plaintiff has no burden of establishing its standing as a matter of law; rather, the

motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (*U.S. Bank N.A. v Trulli,* 179 AD3d 740, 742 [2d Dept 2020]).

The NYSHRL accords greater disability protection than the ADA, and the NYCHRL provides even broader protections (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]). However, regarding whether a party has standing, the statutes are governed by the same standards (*Mendez v Apple* Inc., 2019 WL 2611168, at *4; 2019 US Dist LEXIS 110640, *9 [SD NY 2019]; *and see Dominguez v Pizza Hut of Am., LLC*, 2020 WL 3639977, at *2, 2020 US Dist LEXIS 119114, *4 [SD NY 2020]). Nevertheless, the NYCHRL's "uniquely broad and remedial purposes" must be considered when determining whether plaintiff has standing (*Williams v New York City Hous. Auth*, 61 AD3d 62, 66 [1st Dept 2009]).

The following allegations in the amended complaint are relevant to whether plaintiff has standing: "Plaintiff desired and continues to desire to access the entire McDonald's premises but suffered hardship and emotional distress due to architectural barriers" (NYSCEF 48, ¶ 45). "Plaintiff has a realistic, credible and continuing threat of discrimination from the defendants' non-compliance with the laws prohibiting disability discrimination. The barriers to access within defendants' place of public accommodation continue to exist and deter plaintiff" (*id.*, ¶ 49). "Plaintiff travels to the area where defendants' place of public accommodation is located and intends to patronize the defendants' place of public accommodation after it becomes fully accessible" (*id.*, ¶ 50).

Whether a party has standing to pursue a claim must be determined at the outset of litigation; if the plaintiff has no standing the court has no power to entertain his or her suit (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 812 [2003]). The doctrine of standing is designed to ensure that a party seeking relief has a sufficient stake in the

outcome so as to present a court with a dispute that is capable of judicial resolution (*Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 154-155 [1994]). The most critical requirement of standing is the existence of "injury in fact - an actual legal stake in the matter being adjudicated" (*Society of the Plastics Indus., Inc. v County of Suffolk,* 77 NY2d 761, 772 [1991]). The second requirement is the existence of a causal connection between the injury and the defendant's alleged conduct; and the third requirement is that the plaintiff's injury must be one that is likely to be redressed by a favorable decision (*Kreisler v Second Ave. Diner Corp.*, 731 F3d 184, 187 [2d Cir 2013]). The parties here focus their arguments on the element of injury in fact.

A plaintiff suffers an injury in fact under the ADA where that person has encountered a barrier at a public accommodation and shows that he or she has a genuine desire to return to that place and would return but for the barriers to access (*Small v General Nutrition Cos., Inc.*, 388 F Supp 2d 83, 86 [ED NY 2005]). This injury can take two forms: direct injury from personally encountering the barriers at the defendant's property, or having actual knowledge of the barriers and being deterred from using the property because of the barriers (*Perdum v Forest City Ratner Cos.*, 174 F Supp 3d 706, 714-15 [ED NY 2016], *affd* 677 Fed Appx 2 [2d Cir 2017]; *Feltenstein v City of New Rochelle*, 254 F Supp 3d 647, 652-653 [SD NY 2017]; *Access 4 All, Inc. v Trump Intl. Hotel & Tower Condo.*, 458 F Supp 2d 160, 173 [SD NY 2006]). Deterrence from patronizing a public accommodation constitutes a "concrete and particularized" injury sufficient to confer standing provided that the plaintiff was genuinely deterred and intends to return if the location were accessible (*Kreisler*, 731 F3d at 188; *Yepez v 44 Court St. LLC*, 994 F Supp 2d 333, 335 [ED NY 2014]). To suffer an injury under the deterrence theory, the plaintiff must

have actual knowledge of a barrier to access (*Lowell v Lyft, Inc.*, 352 F Supp 3d 248, 255 [SD NY 2018]; *Perdum,* 174 F Supp 3d at 714-715).

In *Kreisler*, the court found an injury in fact where the disabled plaintiff alleged that he passed by a diner, saw the seven to eight-inch step at the entrance of the diner, and decided that it was impassable and that he was deterred from trying to enter (731 F3d at 188). In this case, plaintiff gives no indication of how he learned about the barrier and was deterred. In addition, he does not give any dates. While as plaintiff argues, the exact date of the injury may not be crucial to stating a cause of action, plaintiff should at least be able to identify some time period within which he became aware of the deterrence.

Plaintiff states that he is not obligated to expose himself to unsafe conditions or impassable barriers in order to have standing. Although a plaintiff need not engage in the "futile gesture" of visiting a building containing known barriers that the owner has no intention of remedying (42 USC § 12188 [a] [1]; *see Lowell,* 352 F Supp 3d at 255-256), the complaint or affidavit must still give rise to "a reasonable inference that he would frequent [the building] were the violation remedied" (*Harty v Greenwich Hosp. Group., LLC,* 536 Fed Appx 154, 155 n [2d Cir 2013]; *Castillo v John Gore Org., Inc.*, 2019 WL 6033088, *3, 2019 US Dist LEXIS 197706, *8 [ED NY 2019]).

While there is no precise degree of likelihood of return to the public accommodation that plaintiff must show, four factors have been identified as relevant: "'(1) the proximity of the place of public accommodation to plaintiff's residence, (2) plaintiff's past patronage of defendant's business, (3) the definitiveness of plaintiff's plans to return, and (4) the plaintiff's frequency of travel near [the accommodation]'" (*Castillo,* 2019 WL 6033088, *4, 2019 US Dist LEXIS 197706, *8-9, quoting *Shariff v Channel Realty of Queens, LLC,* 2013 WL 5519978, *3, 2013

US Dist LEXIS 144081, *8 [ED NY 2013]; *see Camarillo v Carrols Corp.*, 518 F3d 153, 158 [2d Cir 2008] [it was reasonable to infer based on the past frequency of the plaintiff's visits and the proximity of the restaurants to her home that she intended to return to the restaurants in the future]).

In *Kreisler*, the plaintiff testified that he frequented diners in his neighborhood often, that he lived within several blocks of the diner, and that he would frequent the diner if he were able to access it. These allegations created a reasonable inference that he would frequent the diner were the violation remedied (731 F3d at 188). The court in *Shariff* (2013 WL 5519978, *3, 2013 US Dist LEXIS 144081, *10), reached the same conclusion where the plaintiff alleged that he frequented the businesses located within the subject shopping center, that he frequented that area of town because he used the train station around the corner from the shopping center and that, as soon as the accessibility alterations were made, he intended to return to the shopping center. The same result occurred in *Harty v Simon Prop. Group, L.P.* (428 F Appx 69, 71 [2d Cir 2011]), where the plaintiff was not able to access a mall and his proffered reason for wanting to shop in the town where the mall was located was his attendance at gun shows in the town where the mall was located, as well as the mall's proximity to his relatives who lived nearby. The plaintiff produced a list of gun shows that he planned to attend.

In this case, plaintiff's conclusory allegations are devoid of any specificity regarding interest in, or proximity to, McDonald's or the surrounding neighborhood, and plaintiff does not submit an affidavit to supplement the complaint. Plaintiff merely alleges that he travels to the area where the McDonalds restaurant is located, and he intends to patronize it after it becomes fully accessible. While plaintiff contends that he has no obligation to provide evidentiary facts to support the allegations the complaint (*Stuart Realty Co. v Rye Country Store,* 296 AD2d 455,

456 [2d Dept 2002]) he nevertheless, must allege facts that would enable the court to reasonably infer that plaintiff intended to return to the McDonalds were the violation remedied. No such facts are pleaded here, such as plaintiff's past patronage of the McDonalds, the definitiveness of his plans to return to it or his frequency of travel near it. Accordingly, plaintiff lacks standing to maintain this action.

Plaintiff contends that he is entitled to fees incurred in the federal action under the catalyst theory of NYC Administrative Code § 8-502 (g), which provides in pertinent part that "[i]n any civil action commenced pursuant to this section, the court, in its discretion, may award the prevailing party costs and reasonable attorney's fees… prevailing includes a plaintiff whose commencement of litigation has acted as a catalyst to effect policy change on the part of the defendant, regardless of whether that change has been implemented voluntarily as a result of a settlement or as a result of a judgment in such plaintiff's favor … ." Under the catalyst theory, a party is considered the "prevailing party" when its lawsuit is a substantial factor in inducing another party to change the challenged behavior (*see Hugee v Kimso Apts., LLC,* 852 F Supp 2d 281, 296-297 [ED NY 2012]; *Prinzivalli v Farley,* 2016 NY Slip Op 32691[U], **13-14 [Sup Ct, NY County 2016]).

Both sides are silent about any remediations taken as a result of or after the commencement of the federal case. Plaintiff has not submitted any evidence concerning the basis of his fee application, although according to several documents from the federal case both sides indicated that defendants had taken remedial measures since the filing of plaintiff's initial and amended complaints (NYSCEF 17, 20, 21, 22, 23, 57, 58). For example, in an order dated July 11, 2018, Judge Aaron wrote of a conference at which the defendants asserted that, due to

remediation efforts already undertaken or to be undertaken, the ADA claims were moot (NYSCEF 17, at 2).

Defendants argue that plaintiff decided to forgo seeking attorney's fees under the NYCHRL in the federal action and cannot now seek them (*see Gropper v 200 Fifth Owner LLC*, 151 AD3d 635, 636 [1st Dept 2017]). The prohibition against splitting causes of action requires plaintiff to seek attorneys' fees within the action in which they were incurred, not in a subsequent action (*O'Connell v 1205-15 First Ave. Assocs., LLC*, 28 AD3d 233, 234 [1st Dept 2006]).

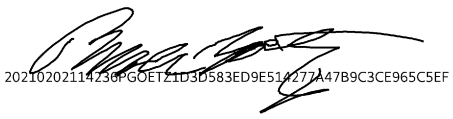
Plaintiff correctly states that he expressly informed the federal court that he intended to pursue the attorney's fees claims under the catalyst theory of the NYCHRL. In his memorandum of law, plaintiff states that "without any request or briefing from the parties, the federal court sua sponte issued an order declining to exercise jurisdiction over plaintiff's remaining nonfederal claims and dismissed the nonfederal claims without prejudice" (NYSCEF 96, at 20 of 25). However, plaintiff does not go on to discuss any efforts to raise the issue with the federal court after the court's order issued. Plaintiff does not explain why he did not attempt to make an application to the district court for attorneys' fees. While the splitting doctrine will not be applied when good reason is shown for omitting part of the claim from an earlier action (Siegel, NY Prac § 220 [6th ed Westlaw]; 1 NY Jur 2d Actions, § 46 [Westlaw ed]), here, plaintiff has failed to proffer a good reason.

Because the motions to dismiss will be granted based on plaintiff's lack of standing and failure to show a good reason for not seeking attorneys fees in the district court, the amended complaint will also be dismissed as against non-appearing/non-moving defendant EJJ Food Corp. (accord *MProsiemo Ltd. V Vaygensberg*, 2018 NY Slip Op 31010[U]; 2018 NY Misc LEXIS 2019 [SC NY Co] [dismissing cause of actions as against a non-moving defendant]).

In conclusion, it is

ORDERED that motion sequence number 003 by defendant Petwil VIII, Inc. to dismiss the amended complaint and motion sequence number 004 by defendants McDonald's Corporation and McDonald's USA, LLC to dismiss the amended complaint is granted; and this action is dismissed as against these defendants and defendant EJJ Food Corp.; and it is further

ORDERED that the Clerk of the Court is directed to enter a judgment of dismissal in favor of defendants Petwill VIII, Inc., McDonald's Corporation, McDonald's USA, LLC, and EJJ Food Corp. with costs and disbursements.



2/1/2021
DATE

PAUL A. GOETZ, J.S.C.

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