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COURT OF APPEALS
STATE OF NEW YORK

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In the Matter of the Application of

ROY DEN HOLLANDER,

Petitioner-Appellant,

-against-

THE CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS,

Respondent-Respondent.

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AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

New York County Sup. Ct.
Index No. 100299/13

INGRID R. GUSTAFSON, an attorney admitted to practice before the courts of this state, affirms, in accordance with C.P.L.R. 2106, that the following statements are true, subject to the penalties of perjury:

1. I am an attorney in the office of ZACHARY W. CARTER, Corporation Counsel of the City of New York and attorney for respondent-respondent the City of New York Commission on Human Rights ("the Commission") in the above-referenced special proceeding. Having successfully represented the Commission in the appeal of petitioner-appellant Roy Den Hollander ("petitioner") to the Appellate Division, First Department, I am familiar with the facts of this case.

2. I submit this affirmation in opposition to petitioner's motion, returnable June 30, 2014, for leave to appeal to this Court from the decision and order of the Appellate Division, First Department, dated June 3, 2014, and reported

at 2014 N.Y. App. Div. LEXIS 3896. The Appellate Division unanimously affirmed a final order and judgment of the New York County Supreme Court (Hunter, J.), entered August 6, 2013.

3. In its order and judgment, the Supreme Court granted the Commission's cross-motion to dismiss the petition on two independent grounds. First, the Court held that the Commission had correctly determined that it lacked jurisdiction to entertain petitioner's age discrimination complaint because petitioner had previously filed a sex discrimination complaint with the New York State Division of Human Rights ("NYSDHR") based on the same incident. Second, the Court held that, in any event, the Commission's alternative determination that there was no probable cause to believe that petitioner had been discriminated against on the basis of age was not arbitrary and capricious.

4. Although the Appellate Division affirmed the dismissal of the petition on both grounds, petitioner here moves for leave to appeal solely on the first ground — that is, that the Commission did not have jurisdiction to entertain his second discrimination complaint. *See* Affidavit in Support of Motion for Leave to Appeal ("Motion for Leave") at ¶ 5.

5. This Court should deny petitioner's leave motion. Petitioner has failed to demonstrate that this case merits review by the Court of Appeals in that: (1) the issue is novel or an issue of public importance, or (2) the First Department's resolution of the issue creates a conflict with prior decisions of this Court or among the departments of the Appellate Division. *See* New York Court of Appeals Rule 500.22(b)(4). Indeed, in arguing that he should be able to file

successive discrimination complaints based on the same incident by shifting his theory of discrimination, petitioner is advocating a departure from well-settled principles of law, and New York courts have repeatedly rejected such attempts to split claims into multiple actions.

Background

6. On January 10, 2010, petitioner filed a verified complaint with NYSDHR. *See* Notice of Motion to Dismiss and in Opposition to the Petition (Apr. 5, 2013), Affirmation of Leonard M. Braman ("Braman Aff."), Ex. 1.[1] Petitioner alleged that Amnesia J.V. LLC ("Amnesia"), a New York City night club, had unlawfully discriminated against him on the basis of sex. *Id.* Specifically, petitioner stated that, on January 9, 2010, at approximately 11:05 p.m., "an individual [at Amnesia] named David" told him and another male friend that, in order to enter the club, they must purchase a bottle at the bar worth $350. Two ladies standing in front of petitioner, as well as "a couple groups of ladies" standing behind petitioner, were allegedly not required to do the same. *Id.*

7. On September 16, 2010, by Determination and Order After Investigation, NYSDHR dismissed petitioner's complaint and closed his file, finding that there was no probable cause to believe that Amnesia had discriminated against him on the basis of sex (A50). Rather, Amnesia's actions were taken "for the non-discriminatory reasons of limited space and the goal of furthering the image of respondent's establishment" (A49-50). In *dicta*, NYSDHR noted that,

[1] Unless otherwise indicated, numbers in parentheses refer to the Appendix ("A") supplied by petitioner. Because the appendix does not include all of the documents relevant to this motion, however, the Commission will also refer to documents in the original record.

although petitioner appeared to be older than Amnesia's patrons, age discrimination in public accommodations was beyond its jurisdiction (A50).

8. On October 22, 2010, petitioner filed a second discrimination complaint with the Commission based on the same alleged incident. *See* Braman Aff., Ex. 3. The complaint's content differed from that of the prior complaint only in that it stated that petitioner was 63 years old, that the patrons were "individuals . . . in their 20's and 30's" instead of "ladies," and that petitioner had been discriminated against on the basis of age instead of sex. *Id.*

9. On July 27, 2012, by Determination and Order After Investigation, the Commission found that, under New York City Administrative Code ("Admin. Code") § 8-109(f)(iii) and the doctrine of election of remedies, it could not entertain petitioner's complaint because he had previously filed a discrimination complaint regarding the same incident with NYSDHR, which had dismissed the complaint for lack of probable cause (A43, A44). The Commission found in the alternative that there was no probable cause to believe that Amnesia had discriminated against petitioner on the basis of age (A41, A44).

10. On August 17, 2012, petitioner appealed the decision to the Commissioner. *See* Braman Aff., Ex. 9. On January 11, 2013, the Commissioner affirmed the decision to dismiss petitioner's complaint (A47).

11. By Verified Petition dated February 5, 2013, petitioner sought an order from the New York County Supreme Court reversing the Commission's January 2013 determination (A13-26). In the petition, petitioner admitted that, at the time he filed his complaint with NYSDHR, he believed that he had been

discriminated against only on the basis of sex (A14). It was not until he read NYSDHR's decision dismissing his complaint that he "realize[d]" he had been discriminated against on the basis of age (A20). On April 5, 2013, the Commission filed a Verified Answer to the petition (A32-40), as a well a Notice of Motion to Dismiss the Petition.

12. Both the Supreme Court, which granted the Commission's motion to dismiss, and the Appellate Division, which affirmed that dismissal, agreed with the Commission's conclusion that the Commission did not have jurisdiction to entertain petitioner's complaint, finding that: (1) the doctrine of election of remedies and Admin. Code § 8-109(f)(iii) barred the Commission from entertaining petitioner's second complaint, (2) petitioner could not avoid the jurisdictional bar by shifting his theory of discrimination, and (3) the Commission's dismissal of petitioner's complaint was therefore proper.

The Motion for Leave to Appeal Should Be Denied.

13. This Court should deny petitioner's leave motion. In arguing that he should be able to avoid a statutory jurisdictional bar by shifting his theory of discrimination, petitioner is advocating not only a departure from well-established legal principles, but also a result that defeats the very purpose of the election-of-remedies provisions of New York City's Human Rights Law.

14. This Court and the Appellate Division have repeatedly held that the doctrine of election of remedies bars successive discrimination complaints where those complaints are based on the same incident or conduct. *See, e.g., Emil v. Dewey*, 49 N.Y.2d 968, 968 (1980) (holding that, under the jurisdictional bar

established by Executive Law §297(9), the filing of a prior complaint with NYSDHR barred a subsequent judicial action "based on the same incident"); *Benjamin v. N.Y.C. Dept. of Health*, 57 A.D.3d 403, 403-04 (1st Dept. 2008) (holding that, under the jurisdictional bar established by Admin. Code § 8-502(a) and the reasoning of *Emil v. Dewey*, the filing of a prior complaint with the Commission barred a subsequent judicial action based "on the same continuing allegedly discriminatory conduct"), *lv. dismissed*, 14 N.Y.3d 880 (2010); *Wrenn v. Verizon*, 106 A.D.3d 995, 996 (2d Dept. 2013).

15. Moreover, the departments of the Appellate Division agree that a "[c]laimant cannot avoid the jurisdictional bar by merely . . . changing his legal theory." *Bhagalia v. New York*, 228 A.D.2d 882, 883 (3d Dept. 1996). Thus, in *Benjamin v. New York City Department of Health*, the First Department held that the plaintiff could not bring a judicial action alleging discrimination on the basis of national origin and a shoulder injury because the plaintiff had previously filed a complaint with the Commission alleging discrimination based on, *inter alia*, skin color. 57 A.D.3d at 403-04. As the Second Department noted in *Craig-Oriol v. Mount Sinai Hospital*, this standard is consistent with New York's "general prohibition against splitting a single claim into multiple actions." 201 A.D.2d 449, 450 (2d Dept. 1994) (citing *O'Brien v. Syracuse*, 54 N.Y.2d 353 (1981); *Smith v. Russell Sage Coll.*, 54 N.Y.2d 185 (1981)), *lv. denied*, 85 N.Y.2d 804 (1995).

16. The plain language of Admin. Code § 8-109(f)(iii), which explicitly deprives the Commission of jurisdiction where (1) a complainant "has previously filed a complaint with [NYSDHR] . . . with respect to the same

grievance" and (2) "a final determination has been made thereon," accords with these well-established principles.

17. Applying Admin. Code § 8-109(f)(iii) and the relevant election-of-remedies precedents to this case, the Appellate Division properly affirmed the Supreme Court's dismissal of the petition. First, prior to filing an age discrimination complaint with the Commission, petitioner had filed a sex discrimination complaint with regard to the same incident with NYSDHR. Second, it is uncontested that NYSDHR's dismissal of petitioner's complaint and closure of his administrative file constituted its "final determination" under the statute. Thus, the Commission correctly determined that it did not have jurisdiction to hear petitioner's second complaint.

18. Notably, even if the language of Admin. Code § 8-109(f)(iii) were ambiguous, which it is not, the Supreme Court and Appellate Division properly left the Commission's determination in this matter undisturbed, as it is well established that "the practical construction of a statute by the agency charged with implementing it, if not unreasonable, is entitled to deference by the courts." *Louis Harris & Assocs. v. deLeon*, 84 N.Y.2d 698, 706 (1994) (granting deference to Commission determination regarding burdens of proof); *see also Acosta v. Loews Corp.*, 276 A.D.2d 214, 220 (1st Dept. 2000). Here, the Commission's construction of Admin. Code § 8-109(f)(iii) is entitled to deference, as it is consistent not only with the plain meaning of that provision, but also with the standard that courts have consistently applied in election-of-remedies cases.

19. Petitioner nonetheless insists that, because NYSDHR does not have jurisdiction over several discrete types of discrimination with regard to public accommodations — including age discrimination — the Appellate Division should have rejected the Commission's interpretation of Admin. Code § 8-109(f)(iii). *See* Motion for leave at ¶¶ 11-15. Instead, petitioner contends, the Appellate Division should have interpreted "same grievance" in Admin. Code § 8-109(f)(iii) to mean "same theory of discrimination," and thereby required the Commission to entertain successive discrimination complaints based on the same incident where they allege different theories of discrimination. *See id.*

20. However, petitioner has cited no support for this theory, merely speculating that his interpretation is the interpretation the legislature intended when they drafted the provision. *See* Motion for Leave at §§ 12-13. Indeed, petitioner cites no case in which an individual was able to circumvent an election-of-remedies provision simply by alleging a new legal theory based on the same incident or conduct.

21. Moreover, petitioner's interpretation would eviscerate the protections of the New York City Human Rights Law's election-of-remedies provisions. Under petitioner's interpretation of Admin. Code § 8-109(f), an individual could file a complaint with the Commission even after a court or NYSDHR had dismissed a prior complaint based on the same incident. For example, a plaintiff could file a lawsuit or complaint alleging race discrimination in court or with NYSDHR, lose, and then re-file essentially the same complaint with the Commission based on color discrimination. This interpretation would

allow complainants a "second bite at the apple" and defeat the very purpose of election-of-remedies provisions.

22. Such a dramatic departure from well-established legal principles is not warranted by the facts of this case. Although petitioner insists that the Commission's interpretation leaves litigants like him without legal remedies for certain complaints, *see* Motion for Leave at ¶ 11, petitioner is incorrect. If petitioner had wanted to file a complaint alleging sex discrimination and age discrimination, he could have done so by initiating an action in the Supreme Court or with the Commission.

23. The fact that petitioner did not file a complaint alleging both sex discrimination and age discrimination is in no way related to the Commission's interpretation of § 8-109(f)(iii). Rather, as petitioner freely admits, he originally alleged only sex discrimination because he believed that he had been discriminated against only on the basis of sex (A14). It was not until he read NYSDHR's decision dismissing his complaint that he decided that he had an age discrimination claim as well (A20). However, at that point, he would have been barred from bringing a subsequent complaint with the Commission on any discriminatory theory, regardless of whether NYSDHR had initially had jurisdiction to decide it.

24. The fact that petitioner now contends that he mistakenly filed his complaint with NYSDHR based on the wrong discriminatory animus should not earn petitioner a second bite at the apple: "[a]fterthoughts or after discoveries however understandable and morally forgivable are generally not enough to create a right to litigate anew." *Reilly*, 45 N.Y.2d at 28.

WHEREFORE, for all the above-stated reasons, the motion for leave to appeal to this Court should be denied, with costs.

Dated: New York, New York
June 26, 2014

/s/ R. Gustafson
INGRID R. GUSTAFSON