

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR.
Justice

PART 33

Index Number : 100299/2013
HOLLANDER, ROY DEN
vs.
NYC COMMISSION ON HUMAN
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 35, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-17
Answering Affidavits — Exhibits _____ | No(s). 18-32; 34
Replying Affidavits _____ | No(s). 33; 35

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the memorandum order and judgment annexed hereto.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/30/13

[Signature], J.S.C.
ALEXANDER W. HUNTER JR.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X
In the Matter of the Application of Roy Den Hollander,

Index No.: 100299/13

Petitioner,

-against-

The City of New York Commission on Human Rights

Respondent.
-----X

Order and Judgment
UNFILED JUDGMENT

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HON. ALEXANDER W. HUNTER, JR.

Two separate applications, an Article 78 petition and a motion to dismiss, were filed in this matter under motion sequences #1 and #2. Both applications will be decided herein.

Petitioner's application for an order pursuant to CPLR Article 78, reversing the Final Determination and Order, dated January 11, 2013, of the City of New York Commission on Human Rights, and finding that petitioner was unlawfully discriminated against because of his age by Amnesia J.V. LLC, and David L.N.U., is denied and the proceeding is dismissed without costs and disbursements to either party. Respondent's motion to dismiss the petition is granted.

On or about January 10, 2010, petitioner filed a verified complaint with the New York State Division of Human Rights (the "Division") charging Amnesia J.V. LLC ("Amnesia"), a night club, with an unlawful discriminatory practice relating to public accommodations because of sex in violation of Article 15, Executive Law (the "Human Rights Law"). Petitioner alleged that on January 9, 2010, petitioner and a male friend stood on a line in front of Amnesia but was refused admittance by doorman David Last Name Unknown ("L.N.U."), unless petitioner and his friend agreed to purchase a \$350 bottle of alcohol. Petitioner and his friend declined, stepped out of the line, and subsequently observed women entering the night club without having to purchase a \$350 bottle of alcohol.

On September 16, 2010, the Division issued a Determination and Order After Investigation, dismissing petitioner's complaint and ordering the file closed for lack of probable cause. The Division investigated petitioner's complaint and noted *in dicta* that petitioner "is significantly older than [Amnesia's] patrons, and age discrimination is beyond the jurisdiction of the Division with regards to public accommodation."

On October 22, 2010, petitioner filed a verified complaint with respondent the City of New York Commission on Human Rights (the "Commission") charging that Amnesia discriminated against him based upon his age. On July 27, 2012, respondent issued a Determination and Order After Investigation, dismissing petitioner's complaint concluding that (1) respondent was statutorily barred from considering petitioner's discrimination claim because he had previously filed a discrimination complaint with the Division based on the same incident

and (2) probable cause did not exist to infer that Amnesia had engaged in age discrimination (the “July 27, 2012 Administrative Closure”).

On August 17, 2012, petitioner appealed the July 27, 2012 Administrative Closure whereby petitioner raised various legal and factual objections. On January 11, 2013, respondent issued a Final Determination and Order After Review upholding its July 27, 2012 Administrative Closure (the “January 11, 2013 Final Determination”).

On February 8, 2013, petitioner commenced the instant special proceeding, seeking an order reversing the January 11, 2013 Final Determination of respondent, and finding that petitioner was unlawfully discriminated against because of his age by Amnesia and David L.N.U. Petitioner avers that (1) respondent’s finding of no probable cause was not based on the evidence as a whole or substantial evidence; (2) respondent’s July 27, 2013 Administrative Closure relied on misrepresentations in finding no probable cause; and (3) respondent conducted an abbreviated and one-sided investigation. On March 1, 2013, petitioner filed a verified supplement to his petition to add a Fourteenth Amendment procedural due process claim against respondent.

In opposition, respondent moves to dismiss, as petitioner’s claims are barred under New York City Administrative Code (“Admin. Code”) §8-109(f)(iii) and Executive Law (“Exec. Law”) §297(9). Respondent avers that petitioner is prohibited from bringing successive discrimination complaints based upon the same incident.

A court may not disturb an administrative decision unless the agency’s action was arbitrary and capricious, was in violation of lawful procedures, or was made in excess of its jurisdiction. See CPLR 7803(3); Pell v. Board of Education of Union Free School District No. 1 of the Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222 (1974). The Commission’s no probable cause determinations will not be overturned unless they are arbitrary or capricious, or lack a rational basis. See Matter of Soo Ching Wu v. New York City Commn. on Human Rights, 84 A.D.3d 823 (2nd Dept. 2011).

New York City’s Human Rights Law (the “City Human Rights Law”) contains an election of remedies provision that requires a petitioner to choose between an administrative remedy and a judicial one. “[A]ny person claiming to be aggrieved by an unlawful discriminatory practice... shall have a cause of action in any court of competent jurisdiction... unless such person has filed a complaint with the city commission on human rights or with the state division of human rights...” **Admin. Code §8-502(a)**. Moreover, the City Human Rights Law does not have jurisdiction to entertain a complaint if there was a previous dismissal by either a court of competent jurisdiction or the Division “with respect to the same grievance which is the subject of the complaint.” **Admin. Code. §8-109(f)**.

Similarly, the Human Rights Law provides for an election of remedies. See Exec. Law §297(9). Exceptions to the election of remedies bar applies when the complaint was dismissed on the grounds of (1) administrative convenience; (2) untimeliness; or (3) annulment of the election of remedies. **Id.**

Controlling case law construes the doctrine of election of remedies to preclude subsequent complaints based on the same alleged incident, same underlying course of conduct, or same operative events. See Emil v. Dewey, 49 N.Y.2d 968 (1980); Benjamin v. New York City Dept. of Health, 57 A.D.3d 403 (1st Dept. 2008); Higgins v. NYP Holdings, Inc., 836 F. Supp. 2d 182 (S.D.N.Y. 2011). “The facts need not be perfectly identical, and merely adding some additional facts and/or re-labeling the claim will not prevent the application of the doctrine of election of remedies.” Benjamin v. New York City Dept. of Health, 17 Misc. 3d 1122(A) (NY Sup Ct 2007), *citing* Bhagalia v. State of New York, 228 A.D.2d 882 (3rd Dept. 1996). Petitioner’s age discrimination claim “constitutes the same cause of action as the formerly litigated [gender] claim,” as it arose out of the same transaction or occurrence from January 9, 2010. Troy v. Goord, 300 A.D.2d 1086, 1087 (4th Dept. 2002); see also Smith v. Russell Sage Coll., 54 N.Y.2d 185, 192-194 (1981); Tsabbar v. Delena, 300 A.D.2d 196, 197 (1st Dept. 2002). Accordingly, petitioner’s application for an order reversing the Commission’s January 11, 2013 Final Determination is denied pursuant to Admin. Code §§8-502(a); 8-109(f)(iii); and Exec. Law §297(9).

No further review is warranted in this matter, however were this court to review the January 11, 2013 Final Determination, this court would find that the above mentioned determination was rationally based. Contrary to petitioner’s contention, Amnesia’s decision for requiring \$350 bottle service was based upon a nondiscriminatory, legitimate reason of “limited space and the goal of furthering the image of [Amnesia’s] establishment,” as determined by the Division. This finding, and the lack of any credible basis in the record before the Commission to find age discrimination, provides a rational basis for this court to affirm the Commission’s January 11, 2013 Final Determination.

There is no merit to petitioner’s contention that the Commission failed to conduct an adequate inquiry into his complaint, as the Commission has “broad discretion in determining the method to be employed in investigating a claim.” Wu v. N.Y.C. Commn. on Human Rights, 84 A.D.3d 823, 824 (2nd Dept. 2011), *quoting* Matter of Levin v. N.Y.C. Commn. on Human Rights, 12 A.D.3d 328, 329 (1st Dept. 2004); see also Stern v. N.Y.C. Commn. on Human Rights, 38 A.D.3d 302, 302 (1st Dept. 2007). It cannot be said that the Commission conducted a one-sided or abbreviated investigation, as it: conducted an intake interview prior to the filing of his complaint; served petitioner’s complaint on his behalf; demanded and obtained a Verified Answer from Amnesia; gave petitioner an opportunity to submit a Rebuttal; obtained and reviewed the Division’s entire file on petitioner’s previous discrimination complaint; attempted to locate David L.N.U.; and attempted to obtain Amnesia’s surveillance video. Consequently, respondent’s investigation was not so one-sided to render it arbitrary or capricious.

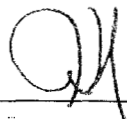
Petitioner’s Fourteenth Amendment procedural due process claim is dismissed, as petitioner was afforded constitutional minimum due process of notice and the opportunity to be heard. See Mathews v. Eldridge, 424 U.S. 319 (1976). Furthermore, petitioner had an adequate post-deprivation opportunity to be heard in this Article 78 proceeding. See Velella v. N.Y.C. Local Conditional Release Commn., 13 A.D.3d 201, 202 (1st Dept. 2004).

Accordingly, it is hereby,

ADJUDGED that petitioner's application pursuant to CPLR Article 78, reversing the Final Determination and Order, dated January 11, 2013, of the City of New York Commission on Human Rights, and finding that petitioner was unlawfully discriminated against because of his age by Amnesia J.V. LLC, and David L.N.U., is denied and the proceeding is dismissed without costs and disbursements to either party. Respondent's motion to dismiss the petition is granted.

Dated: July 30, 2013

ENTER:



J.S.C.

ALEXANDER W. HUNTER JR

UNFILED JUDGMENT

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