To be Argued by:
MICHAEL Y. HAWRYLCHAK
(Time Requested: 30 Minutes)

CTQ-2020-00002

Court of Appeals

of the

State of New York

BROOKLYN CENTER FOR PSYCHOTHERAPY, INC.,

Appellant,

– against –

PHILADELPHIA INDEMNITY INSURANCE CO.,

Respondent.

ON APPEAL FROM THE QUESTION CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN DOCKET NO. 19-2266

BRIEF FOR APPELLANT

O'CONNELL & ARONOWITZ, P.C.
Attorneys for Appellant
54 State Street, 9th Floor
Albany, New York 12207
Tel.: (518) 462-5601
Fax: (518) 462-2670

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR § 500.1(f), Appellant Brooklyn Center for Psychotherapy, Inc. states that it has no corporate parent, subsidiary, or affiliate.

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QUESTION PRESENTED

Must a general liability insurance carrier defend an insured in an action alleging discrimination under a failure-to-accommodate theory?

Yes, a claim for discrimination by failure to accommodate is a covered "occurrence" under New York law.

INTRODUCTION

Faced with a complaint (the "*Goldman* Complaint") alleging disability discrimination by failure to accommodate, Appellant Brooklyn Center for Psychotherapy, Inc. ("Brooklyn Center") was forced to defend against the possibility of being held liable for purely nonintentional discrimination. Respondent Philadelphia Indemnity Insurance Co. ("PIIC") denied insurance defense coverage under Brooklyn Center's liability policy (the "Policy"), arguing that the *Goldman* Complaint alleged only intentional discrimination, which falls outside of the Policy's coverage.

PIIC's argument relies on an expansive interpretation of the word "intentional" that, if actually applied as PIIC advocates, would wrongly deny insurance defense coverage for vast categories of insurable legal claims against which insureds like Brooklyn Center believe they have purchased protection. PIIC further contends that allegations of intentional discrimination so taint the *Goldman* Complaint that even claims requiring no proof of intent are removed from insurance

coverage. In this way, an insurer's obligation to defend against a complaint asserting any covered claim is flipped on its head; under PIIC's approach, allegations of uncovered conduct completely relieve the insurer of its obligation to defend even if those allegations are unnecessary for the proof of otherwise covered claims in the complaint.

STATEMENT OF THE CASE

This certified question arises out of an insurance coverage dispute between Brooklyn Center and PIIC, itself arising out of PIIC's refusal to defend Brooklyn Center in another action, *Fanni Goldman v. Brooklyn Center for Psychotherapy, Inc.*, 15-CV-2572 (PKC) (PK), filed in the Eastern District of New York on May 5, 2015.

A. The *Goldman* Complaint

The plaintiff in the underlying action, Fanni Goldman, is a deaf individual who primarily communicates in ASL. A041 ¶ 1. Brooklyn Center is an outpatient psychiatric clinic which provides mental health services. A033 ¶ 1. Goldman alleged, *inter alia*, that Brooklyn Center unlawfully discriminated against her based on her disability by failing to provide an ASL interpreter when she requested an appointment for her son. A044 ¶ 24.

Goldman's lawsuit alleged disability discrimination in violation of Title III of the Americans with Disabilities Act (42 U.S.C. § 12182), Section 504 of the

Rehabilitation Act of 1973 (29 U.S.C. § 794), the New York State Human Rights Law ("NYSHRL") (N.Y. Exec. Law § 296), and the New York City Human Rights Law ("NYCHRL") (N.Y.C. Admin. Code § 8-107). A034 ¶ 6. Goldman accused Brooklyn Center of, among other things, denying her services based on her disability, causing her emotional distress, fear, anxiety, indignity, and humiliation. A034 ¶ 8. As a result of these alleged wrongs, the *Goldman* Complaint sought compensatory damages as well as declaratory and injunctive relief, together with punitive damages, attorneys' fees, and costs. A034 ¶ 7.

B. The Policy

Brooklyn Center purchased Policy No. PHPK1257626 from PIIC. The Policy provides liability coverage and also states that PIIC would provide, at its cost, legal counsel to defend Brooklyn Center against covered claims. A034–35 ¶ 9. Following receipt of the *Goldman* Complaint, Brooklyn Center contacted PIIC, advised it of the lawsuit, and requested defense. A035 ¶ 10.

On May 18, 2015, PIIC declined to provide Brooklyn Center with defense costs or indemnification, claiming that the *Goldman* Complaint's allegations of disability discrimination were not allegations of "bodily injury, property damage, or personal injury caused by an occurrence as defined under the policy." A035 ¶ 11, A062. On August 7, 2018, Brooklyn Center again demanded defense and indemnification in the *Goldman* action, alleging that PIIC's Disclaimer of Coverage

constituted a breach of the Policy. A035 ¶ 14, A065. On September 10, 2018, PIIC denied Brooklyn Center defense and indemnification for the second time. A035 ¶ 15, A072. This second refusal asserted that none of the claims in the *Goldman* Complaint constituted a covered "occurrence" under the terms of the Policy. A072.

C. The *Goldman* Trial

The *Goldman* action was tried in the Eastern District of New York from January 14, 2019 through January 17, 2019. The jury instructions did not require a finding of discriminatory intent for any of the four statutory causes of action. A470–75. Following deliberations, the jury returned a verdict for Brooklyn Center on all claims, finding that it had not violated any of the federal or state anti-discrimination statutes under which Goldman had sued. A483–84. As a result of PIIC's refusal to provide a defense or to pay defense costs, Brooklyn Center incurred substantial legal costs in defending itself against the *Goldman* Complaint. A037–38 ¶ 32.

D. The Insurance Action

On October 4, 2018, Brooklyn Center filed an action against PIIC in Kings County Supreme Court. A029. PIIC subsequently removed the action to the Eastern District of New York. A025–27. Brooklyn Center's Complaint alleged, as relevant here, that PIIC's denial of coverage for defense costs against the *Goldman* Complaint constituted a breach of the Policy between Brooklyn Center and PIIC. A038 ¶ 33. Brooklyn Center sought an order directing PIIC to reimburse Brooklyn

Center for all legal fees, costs, and disbursements incurred in defending against the *Goldman* Complaint. A039 ¶ 2. On February 11, 2019, PIIC moved to dismiss Brooklyn Center's action for failure to state on claim on which relief could be granted. A073. On July 2, 2019, the District Court issued a Memorandum Decision and Order, granting the motion to dismiss on all claims. A494–503. The District Court entered judgment the following day, dismissing Brooklyn Center's Complaint in its entirety with prejudice. A504. On July 23, 2019, Brooklyn Center appealed this dismissal to the Second Circuit Court of Appeals. A505. After briefing and oral argument, the Second Circuit issued an order on April 9, 2020, holding that "it is not clear under New York law whether a failure to accommodate a disability can be an 'occurrence' for purposes of coverage under the Policy," and certifying that question of law to this Court. A003–19. On May 7, 2020, this Court accepted the certified question. A020.

SUMMARY OF ARGUMENT

During the course of this litigation, PIIC has alternately argued (1) that failure-to-accommodate claims are not covered occurrences because they involve intentional acts by the insured, and (2) that the claims in the *Goldman* Complaint cannot be covered occurrences because the Complaint included allegations of intentional discrimination. PIIC is wrong on both counts. First, failure-to-accommodate claims are covered occurrences in New York as a matter of public

policy and the interpretation of standard insurance policy language. PIIC's argument to the contrary relies on a capacious view of intentionality that is at odds with well-settled case law and common sense. Second, a complaint that adequately alleges a failure-to-accommodate theory of discrimination alleges a covered occurrence regardless of whether the complaint also includes allegations of intentional discrimination.

Each of the four statutory causes of action for disability discrimination in the *Goldman* Complaint can support multiple theories of liability, including both disparate treatment and failure to accommodate. The *Goldman* Complaint alleged facts sufficient to show discrimination under a failure-to-accommodate theory for each cause of action.

Like disparate *impact* claims, but unlike disparate *treatment* claims, a claim of discrimination under a failure-to-accommodate theory requires no showing of discriminatory intent. As a matter of law and logic, insurance coverage for failure-to-accommodate claims should not be deemed barred as against public policy, just as coverage of disparate impact claims is not prohibited, again unlike disparate treatment claims. The coverage and exclusion language of the Policy tracks New York public policy with respect to coverage of intentional acts, and failure-to-accommodate claims are therefore covered occurrences under the Policy.

An insurer's duty to defend attaches whenever a complaint alleges *any* covered claim, regardless of whether the complaint also alleges claims outside the policy's coverage. Because the *Goldman* Complaint alleged failure-to-accommodate claims, PIIC was obligated to defend Brooklyn Center, regardless of whether the Complaint also alleged claims of disparate treatment.

Moreover, each of the *Goldman* Complaint's failure-to-accommodate claims was supported by factual allegations sufficient to make out a theory of negligent or unintentional failure to accommodate. Even if a theoretical failure-to-accommodate claim that allowed for no possibility of unintentional discrimination might fall outside of the Policy's coverage, PIIC's duty to defend was triggered by the *Goldman* Complaint's allegation of failure-to-accommodate claims that could be proved without demonstrating any discriminatory intent.

ARGUMENT

POINT I

FAILURE-TO-ACCOMMODATE CLAIMS ARE COVERED OCCURRENCES AS A MATTER OF NEW YORK PUBLIC POLICY AND THE INTERPRETATION OF STANDARD INSURANCE

POLICY TERMS.

A. Insurance coverage is barred only where the insured intended the damages or knew that they would flow directly and immediately from its intentional act.

The Policy obligated PIIC to defend the insured against any suit seeking damages for "bodily injury"[1] caused by an "occurrence". A291. At issue is whether any claim in the *Goldman* Complaint was an "occurrence" as defined in the Policy. The Policy defines an occurrence to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." A304. Additionally, the Policy has a specific exclusion for "'[b]odily injury' or 'property damage' expected or intended from the standpoint of the insured." A292. PIIC has contended, and the federal District Court held, that the *Goldman* Complaint alleges only intentional discrimination and therefore cannot be said to plead an "occurrence," defined as an "accident." *See* A499–501.

In *Agoado Realty Corp. v. United International Insurance Co.*, 95 N.Y. 2d 141, 145 (2000), this Court considered an insurance policy that, like the Policy here, defined an "occurrence" as an "accident," and contained an exclusion for bodily injury that is "expected or intended from the standpoint of the insured." The Court

[1] PIIC does not contest that under New York law 'bodily injury' as defined in the Policy applies to claims for emotional distress. *Lavanant v. General Accident Ins. Co.*, 79 N.Y. 2d 623 (1992). The *Goldman* Complaint, which alleges that Goldman suffered from emotional distress, including fear, anxiety, and humiliation as a result of Brooklyn Center's alleged refusal to provide her with an ASL interpreter therefore alleges a bodily injury. A045 ¶ 30.

explained the scope of the term "accident," holding that "in deciding whether a loss is the result of an accident, it must be determined, *from the point of view of the insured*, whether the loss was unexpected, unusual and unforeseen." *Id.* (emphasis in original). Thus, the exclusion for injury that is "expected or intended," is simply the flip side of the scope of coverage for an "accident," defined as an injury that was "unexpected, unusual and unforeseen." *See Technicon Elecs. Corp. v. Am. Home Assur. Co.*, 141 A.D.2d 124, 134 (2d Dep't 1988), *aff'd*, 74 N.Y.2d 66 (1989) ("'accidental' is, generally speaking, the opposite of 'intentional' or 'expected.'").

This Court has explained that "the term accident must be construed in its relevant context; but we hold that the relevant context to be considered is the fact that it is a word employed by an insurer in the contract and should be given the construction most favorable to the insured." *McGroarty v. Great Am. Ins. Co.*, 36 N.Y.2d 358, 364 (1975). The Court held that "it is not legally impossible to find accidental results flowing from intentional causes, i.e., that the resulting damage was unintended although the original act or acts leading to the damage were intentional." *Id.*

New York's Superintendent of Insurance has explained these decisions as consonant with New York public policy. "Liability insurance coverage for intentional wrongs is, and has always been, prohibited." Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994). But, "whether coverage is permissible or not

turns most centrally upon the relationship between the wrongdoer's act and the resultant harm: if that relationship may be said to be sufficiently fortuitous, rather than intended, coverage is permitted." *Id.*

In holding that the *Goldman* Complaint alleged only intentional acts, the federal District Court stated, citing several New York cases, that "[w]hen a defendant commits an affirmative act, the action is not an accident even if the results were unintended." A499. The District Court held that "[e]ach claimed action — the refusal to give Ms. Goldman accommodation and the policy against offering interpretation services — was expected or intended by the insured," and thus "[t]he Goldman complaint alleged only intentional acts resulting in discrimination." A499, 501. But in so holding, the District Court created a new categorical rule at odds with New York caselaw by misapplying broad language far outside of its original context.

First, a significant body of New York case law runs directly contrary to this position. "[R]egardless of the initial intent or lack thereof as it relates to causation, or the period of time involved, if the resulting damage could be viewed as unintended by the fact finder the total situation could be found to constitute an accident." *McGroarty*, 36 N.Y.2d at 364–65. Indeed, this is so even if the insured knew that its actions "might lead to some eventual damage" but "nevertheless took the calculated risk that such would not eventuate and elected to continue operations without attempting to correct its methods." *Id.* at 364. "Injuries are accidental or

the opposite, for the purpose of indemnity, according to the quality of the results rather than the quality of the causes." *Messersmith v. Am. Fid. Co.*, 232 N.Y. 161, 166 (1921) (Cardozo, J.). "The character of the liability is not to be determined by analyzing the constituent acts, which, in combination, make up the transaction, and viewing them distributively. It is determined by the quality and purpose of the transaction as a whole." *Id.*

Second, these seemingly contradictory propositions can be reconciled by recognizing that the doctrine relied on by the District Court and PIIC has its origin in cases dealing with indisputably wrongful acts. In *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 162 (1992), this Court held that a defendant accused of the violent sexual abuse of children could not claim that the resulting injuries were unintentional. Similarly, in *Jacobs v. Aetna Casualty and Surety Company*, 216 A.D.2d 942, 943 (4th Dept. 1995), the Fourth Department held that injuries directly resulting from an intentional assault could not be considered "unexpected or unintentional." *See also Tomain v. Allstate Ins. Co.*, 238 A.D.2d 774, 776 (3d Dep't 1997) (malicious prosecution); *Monter v. CNA Ins. Cos.*, 202 A.D.2d 405, 406–07 (2d Dep't 1994) (violent assault).

A legal rule should not be blindly applied to dissimilar circumstances. Transplanting a rule developed to deal with acts that are not only intentional torts but *malum in se* crimes to cases involving the highly fact-dependent question of

reasonable accommodation should not be done without due attention to the significant differences. In *Mugavero*, this Court explicitly recognized the narrow domain of the rule it was announcing, noting the normal rule that "more than a causal connection between the intentional act and the resultant harm is required to prove that the harm was intended," but holding that "in the exceptional case of an act of child molestation, cause and effect cannot be separated." *Mugavero*, 79 N.Y.2d at 160. The New York Superintendent of Insurance characterized the emerging caselaw as suggesting "that the question of whether coverage is permissible or not turns most centrally upon the relationship between the wrongdoer's act and the resultant harm: if that relationship may be said to be sufficiently fortuitous, rather than intended, coverage is permitted. In other cases — such as sexual battery against children — where harm is so direct and inescapable a result of the act that no fortuity can reasonably or objectively be said to exist, coverage is impermissible." Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994).

Third, taken literally, the principle espoused by PIIC and the District Court would exclude from coverage numerous indisputably insurable claims. Even many pure negligence claims would be barred under a simplistic application of this doctrine; a driver's decision to turn left at an intersection is undoubtedly an intentional act, but it would be plainly wrong to hold, as a matter of law, that the

driver necessarily intended the ensuing collision. *See Messersmith*, 232 N.Y. at 166 (Cardozo, J.).

The failure-to-accommodate discrimination claims at issue here need not involve any inherently wrongful act. The decision not to provide some particular accommodation is not in and of itself wrongful, and may not provide a basis for any liability unless the denial of the requested accommodation is determined to be unreasonable in light of the specific facts surrounding the particular request for accommodation. The mere fact that the causal chain resulting in a failure-to-accommodate claim may include a decision as to whether to make an accommodation does not remove that claim from insurance coverage.

B. Discrimination claims that do not require proof of discriminatory intent are covered occurrences.

New York courts have not addressed the issue of insurance coverage of claims based on failure to provide reasonable accommodations. A broader look at the nature of different discrimination theories and how they have been treated for purposes of insurance coverage is instructive.

Disparate treatment "is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion or other protected characteristics. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of

differences in treatment." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (quoting *Teamsters v. United States*, 431 U.S. 324, 335–336, n. 15 (1997)) (alteration omitted). Disparate impact, by contrast, "involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another . . . Proof of discriminatory motive is not required under a disparate-impact theory." *Id.* (alteration omitted).

While disparate treatment, by definition, involves an intention to treat someone differently on the basis of protected characteristics, disparate impact requires no such intention. An employer, for example, could adopt a policy concerning employee promotion that results in disparate outcomes for groups identified on the basis of protected characteristics — in other words, a policy giving rise to liability for discrimination — without any discriminatory intent by the employer. *See Briscoe v. City of New Haven*, 967 F. Supp. 2d 563, 589 (D. Conn. 2013) ("One of the forms that proscribed discrimination can take is an employment practice, taken in good faith and for non-discriminatory reasons, which nonetheless has a disparate impact upon persons of a protected group."). And the adoption of a particular practice does not by itself create disparate impact liability. There is liability only if that practice in fact results in "a significantly adverse or disproportionate impact on persons of a particular type." *Mhany Mgmt., Inc. v. Cty. of Nassau,* 819 F.3d 581, 617 (2d Cir. 2016).

Insurance coverage for disparate treatment is barred as a matter of New York public policy and insurance policy interpretation. New York's Superintendent of Insurance has explained that "discrimination based upon disparate treatment is an intentional wrong whose resultant harm flows directly from the acts committed, and liability coverage for it is impermissible." Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994). *See also Hubel v. Madison Mut. Ins. Co.*, No. 2001-5404, 2003 WL 21435624, at *4 (N.Y. Sup. Ct. Onondaga Cty. May 16, 2003) ("There is nothing accidental about a single, specific and express decision not to rent to a prospective tenant."); *Mary & Alice Ford Nursing Home Co. v. Fireman's Ins. Co. of Newark, N.J.*, 86 A.D.2d 736, 737–38 (3d Dep't), *aff'd sub nom. Mary & Alice Ford Nursing Home Co. Inc. v. Fireman's Ins. Co. of Newark, New Jersey*, 57 N.Y.2d 656 (1982) ("intentionally discriminatory" firing because of disability is not a covered occurrence). But disparate treatment definitionally involves an intentional wrong — discriminatory intent is an element of the claim.

By contrast, coverage of disparate impact claims is not barred by New York public policy as explicated by the Superintendent of Insurance because "the strong public policy against discrimination of any kind is, in fact, furthered by permitting coverage of" such claims where "the discriminatory result does not directly proceed from specific discriminatory acts against individuals." Circular Letter No. 6, N.Y.S.

Ins. Dep't (May 31, 1994).[2] At least one New York court has similarly interpreted standard insurance policy language as covering disparate impact claims. *See Am. Mgmt. Ass'n v. Atl. Mut. Ins. Co.*, 168 Misc. 2d 971, 976 (Sup. Ct. N.Y. Cty.), *aff'd*, 234 A.D.2d 112 (1st Dep't 1996) (claims for disparate impact are covered even where "[i]t is undisputed that [the insurer's] policy does not provide insurance coverage for intentional acts of discrimination").

The difference between disparate treatment and disparate impact also illustrates what "intended" or "expected" effects mean for purposes of insurance coverage. Even though virtually every disparate impact claim involves intentional actions — for example, the adoption of a policy for hiring and promotion — this does not remove these claims from insurance coverage because the ultimate wrong — the disparate impact — was not intended. But insurance coverage for disparate impact is not barred because "specific discriminatory acts against individuals . . . are not an element of the wrong and need play no part in the facts alleged." Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994).

[2] This Court has held that determinations of the Superintendent of Insurance are entitled to deference "unless irrational or unreasonable" or "counter to the clear wording of a statutory provision." *In re Liquidation of Consol. Mut. Ins. Co.*, 60 N.Y.2d 1, 8 (1983) (internal quotation marks omitted).

C. Failure-to-accommodate claims are covered occurrences.

Causes of action for disability discrimination are not limited to disparate treatment and disparate impact as theories of liability, but also allow recovery under a failure-to-accommodate theory. *See Fulton v. Goord*, 591 F.3d 37, 43 (2d Cir. 2009) (noting in an ADA and Rehabilitation Act case that "[a] qualified individual can base a discrimination claim on any of three available theories: (1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation." (internal quotation marks omitted)).

Failure to accommodate is a third distinct type of discrimination claim, different from disparate treatment and disparate impact, with distinct elements of proof, *see Fulton*, 591 F.3d at 44 (noting fact-intensive inquiry necessary for failure to accommodate claims), and no New York court has yet decided whether failure-to-accommodate claims are covered occurrences for purposes of insurance coverage.

Nevertheless, although they are distinct theories, disparate impact and failure to accommodate share considerable similarities. "As with disparate-impact claims, failure-to-accommodate claims do not require proof of discriminatory intent." *Brooklyn Ctr. for Psychotherapy, Inc. v. Philadelphia Indem. Ins. Co.*, 955 F.3d 305, 312 (2d Cir.). Like disparate impact, failure to accommodate can be proven through a policy adopted at one time (for example, minimum job qualification standards) that results in a discriminatory effect at a later time (for example, a disparate hiring rate

for members of different racial groups, or the disqualification of a disabled applicant unable to perform certain less essential job tasks).

Significantly, like disparate impact, failure-to-accommodate theories can result in liability even where it was difficult or impossible to predict in advance that a policy or practice would be deemed discriminatory. Indeed, a failure-to-accommodate claim alleging the absence of an accommodation (for example, ASL interpretation) that has a particular negative impact on a protected group (for example, the deaf), is, in essence, a disparate impact claim which relaxes the requirement of proving a comparison class less affected by the lack of accommodation. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 276 (2d Cir. 2003).

In enacting the earliest federal legislation to combat disability discrimination, the problem "was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference — of benign neglect". *Alexander v. Choate*, 469 U.S. 287, 295 (1985). Congress believed that many of the primary targets of this legislation — for example, architectural barriers, inaccessible public transportation, and unnecessary job qualifications — were not created "with the aim or intent of excluding the handicapped." *Id.* Legislative responses to disability discrimination, and subsequent caselaw interpreting that legislation, have allowed plaintiffs to establish liability through both disparate-

impact and failure-to-accommodate theories, without any showing of discriminatory intent.

In reasoning that insurance against disparate impact claims should not be barred as a matter of public policy, New York's Superintendent of Insurance noted that, in contrast with disparate treatment claims, "specific discriminatory acts against individuals . . . are not an element of the wrong and need play no part in the facts alleged." Circular Letter No. 6, N.Y.S. Ins. Dep't (May 31, 1994). The same is true of failure-to-accommodate claims. The Superintendent went on to explain the public policy benefits of allowing coverage.

> [T]he strong public policy against discrimination of any kind is, in fact, furthered by permitting coverage of the kinds described. By bringing to employers' attention practices that can potentially result in unlawful discrimination, insurers' loss prevention programs and underwriting standards should discourage such practices. Any employer who does not diligently attempt to modify employment procedures accordingly may well be denied insurance coverage. When unlawful acts of discrimination occur nonetheless, coverage will help ensure just compensation for victims.

Liability for disability discrimination on the basis of a failure to accommodate is a "fact-intensive inquiry." *Vale v. Great Neck Water Pollution Control Dist.*, 80 F. Supp. 3d 426, 438 (E.D.N.Y. 2015). "'Reasonable' is a relational term: it evaluates the desirability of a particular accommodation according to the consequences that the accommodation will produce. This requires a fact-specific, case-by-case inquiry, not only into the benefits of the accommodation but into its costs as well. With such a context-sensitive inquiry, what is reasonable might vary

among qualified individuals." *Fulton v. Goord*, 591 F.3d 37, 44 (2d Cir. 2009) (internal quotation marks and citations omitted). "[A]n accommodation is reasonable only if its costs are not clearly disproportionate to the benefits that it will produce." *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995). And the exact same accommodation might be deemed reasonable for one person, but unreasonable for another. *See Fulton*, 591 F.3d at 44 (accommodation could be necessary to allow access by prison inmate's disabled spouse, but unnecessary for a similarly disabled relative or acquaintance).

"Reasonable accommodation may take many forms." *Noll v. Int'l Bus. Machines Corp.*, 787 F.3d 89, 95 (2d Cir. 2015). "[E]mployers are not required to provide a perfect accommodation or the very accommodation most strongly preferred by the employee. . . . the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide." *Id.*

The injury in a meritorious failure-to-accommodate claim is not the denial of an accommodation, but the lack of access to services resulting from that denial. *See* 42 U.S.C.A. § 12182 (requiring modifications when "necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities"); N.Y. Exec. Law § 296 (requiring modifications when "necessary

to afford facilities, privileges, advantages or accommodations to individuals with disabilities" or when such persons would be "excluded or denied services because of the absence of auxiliary aids and services"); N.Y.C. Admin. Code § 8-107 (requiring reasonable accommodations "to enable a person with a disability to satisfy the essential requisites of a job or enjoy the right or rights in question"). In other words, the failure to provide a disability accommodation alone does not create liability unless and until that failure results in the inability to access services.

Here, the *Goldman* Complaint alleged that the failure to provide an ASL interpreter constituted a discriminatory failure to accommodate. ASL interpreters are "a common form of reasonable accommodation," *Noll*, 787 F.3d at 96, but they are not necessarily required in every case in which they are requested. For example, in *Howard v. United Parcel Service, Inc.*, 101 F. Supp. 3d 343, 346 (S.D.N.Y. 2015), *aff'd sub nom. Howard v. United Parcel Serv.*, 648 F. App'x 38 (2d Cir. 2016), a deaf employee's request for an ASL interpreter was rejected. The court held that he had been provided with other reasonable accommodations, and thus was not entitled to "the accommodation plaintiff subjectively believes best serves his needs." *Id.* at 355. *See also Berry-Mayes for Estate of Berry v. N.Y. Health & Hosps. Corp.*, No. 14-CV-9891 (PKC), 2016 WL 8461191, at *9 (S.D.N.Y. Sept. 19, 2016) (endorsing the use of "appropriate auxiliary aids" including written notes, and holding that "[i]t is consistent with the ADA and the Rehabilitation Act for a hospital to provide an

interpreter only in particular situations during a patient's hospitalization."), *aff'd in part sub nom. Berry-Mayes v. New York City Health & Hosps. Corp.*, 712 F. App'x 111 (2d Cir. 2018) (noting that patient had "at least *some* ability to communicate other than through sign language").

In short, there is no blanket duty for every place of public accommodation to have a full-time ASL interpreter on staff or to procure one in response to every request. This is significant because it necessarily severs the direct causal link between the decision not to provide an accommodation and the resulting harm. Even if a jury were to have found that Brooklyn Center's failure to provide an ASL interpreter amounted to discrimination by failure to accommodate, this would not mean that Brooklyn Center expected or intended the resultant harm. Brooklyn Center could have believed, for example, that video relay services or written communications would have adequately enabled a deaf person to access the available services.

Although New York courts have not spoken directly to the issue of coverage of failure-to-accommodate claims, courts in other states with similar prohibitions on the coverage of intentional torts have done so. In *Republic Indemnity Co. v. Superior Court*, 224 Cal. App. 3d 492, 502 (Ct. App. 1990), a California appellate court held that failure-to-accommodate claims are not barred by California law, because the prohibition requires "specific intent to injure or harm, not merely a general intent to

perform the act." A line of cases following *Republic* have agreed that for purposes of insurance coverage, "intentional required some sort of wrongful conduct, not just any purposeful act." *Berns v. Sentry Select Ins. Co.*, 766 F. App'x 515, 517 (9th Cir. 2019) (internal quotation marks omitted); *see also Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.*, 14 Cal. App. 4th 1595, 1610 (1993) (distinguishing the "unintentional acts of discrimination resulting from a failure to accommodate an employee" in *Republic* from intentional sexual harassment).

In *Ron Tonkin Chevrolet Co. v. Continental Insurance Co.*, 126 Or. App. 712, 716 (1994), an Oregon court found that insurer was required to defend against a religious discrimination failure-to-accommodate claim because that claim "need not be intentional," so the employee's "complaint could admit proof of conduct covered by [the employer]'s insurance policy, and that, as a matter of law, [the insurer] was required to defend that action." *See also* Francis J. Mootz III, Insurance Coverage of Employment Discrimination Claims, 52 U. Miami L. Rev. 1, 33–34 (1997) ("[I]n 1994 the New York Department of Insurance clarified its longstanding prohibition on insurance coverage for discrimination by making clear that there is no public policy bar to insuring disparate impact discrimination. Courts and regulators have adopted this same approach when dealing with other anti-discrimination statutory schemes that assess liability without proof of an intent to discriminate." (footnotes omitted).

In a disparate impact case, a defendant might *intentionally* enact a facially neutral policy without *intending* the resulting disparate impact on different classes of persons. Likewise, in a failure-to-accommodate case, a defendant might *intentionally* enact a policy with respect to available accommodations without *intending* the resulting inability of a person with a disability to access services. This is notably unlike a disparate treatment claim where the intentional act — denying access on the basis of a protected characteristic — is one and the same with the actionable harm. Due to the fact-intensive nature of reasonable accommodations determinations generally, and the necessity of ASL interpreters specifically, a party intentionally adopting a policy concerning the provision of disability accommodations does not necessarily intend any resulting inability to access services. Under these circumstances, a failure to provide reasonable disability accommodations is "accidental" and thus an "occurrence" for purposes of insurance defense coverage.

POINT II

ALLEGATIONS SUFFICIENT TO STATE A CLAIM FOR DISCRIMINATION BY FAILURE TO ACCOMMODATE ARE ENOUGH TO BRING A COMPLAINT WITHIN INSURANCE DEFENSE

COVERAGE.

A. Insurance defense coverage is triggered when a complaint contains allegations sufficient to support a covered claim.

In New York, it is well-established that an insurer's duty to defend is broader than its duty to indemnify. *Automobile Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131 (2006). As the duty to defend is "exceedingly broad," an insurer must defend "whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim," or whenever the insurer "has actual knowledge of facts establishing a reasonable possibility of coverage." *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169, 175 (1997). "[A]n insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage." *Auto. Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 137 (2006) (internal quotation marks and ellipsis omitted).

Even though an insurer may not ultimately be obligated to indemnify its insured because it is established at trial that the event falls outside the coverage of the insurance policy or because it is determined that the insured is not liable to the injured party, the insurer may still be obligated to defend the insured party. *See Ruder & Finn, Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 669–670 (1981).

The burden of proving that the claims against the insured are not covered by the policy lies with the insurer. *See International Paper Co. v. Continental Cas. Co.*,

35 N.Y.2d 322, 327 (1974). "[B]efore an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case." *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 311 (1984). "[I]f the insurer is to be relieved of a duty to defend it is obligated to demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, In toto, are subject to no other interpretation." *Int'l Paper Co. v. Cont'l Cas. Co.*, 35 N.Y.2d 322, 325 (1974).

Brooklyn Center does not dispute that the *Goldman* Complaint contains allegations of intentional discrimination. Nor does Brooklyn Center dispute that intentional discrimination claims, standing alone, would not fall within the coverage of the Policy, and thus would not trigger insurance defense coverage.

But insurance defense coverage does not turn on whether a complaint alleges any noncovered claim, nor does it require that *all* claims in a complaint be covered by insurance. Rather, if *any* claim in the complaint is even "arguably" covered by the insurance policy, then the duty to defend attaches. *Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co.*, 16 N.Y.3d 257, 264 (2011). The *Goldman* Complaint easily clears this low bar.

Taking the *Goldman* Complaint as pleaded, the plaintiff could have prevailed at trial without proving any intentional discrimination. The elements of a

discrimination claim under the ADA are "(1) that [plaintiff] is a qualified individual with a disability; (2) that she was excluded from participation in a public entity's services, programs or activities or was otherwise discriminated against by a public entity; and (3) that such exclusion or discrimination was due to her disability." *Davis v. Shah*, 821 F.3d 231, 259 (2d Cir. 2016). Under a failure-to-accommodate theory, "a covered entity's failure to provide such accommodations will be sufficient to satisfy the third element." *McInerney v. Rensselaer Polytechnic Inst.*, 688 F. Supp. 2d 117, 125 (N.D.N.Y. 2010).

Taken as a whole, the *Goldman* Complaint contains allegations more than sufficient to state a claim for nonintentional discrimination based on a failure-to-accommodate theory. It alleges, among other things, that:

- "Fanni Goldman is a deaf individual who communicates primarily in American Sign Language ('ASL')," and she "brings this action because of Defendant's unlawful discrimination against her and its failure to accommodate by ensuring effective communication with her." A041 ¶ 1.
- Goldman "is deaf, primarily communicates in American Sign Language, and is substantially limited in the major life activities of hearing and speaking within the meaning of federal, state, and local antidiscrimination laws." A042 ¶ 3.
- Brooklyn Center "is a place of public accommodation under federal, state, and local antidiscrimination laws and is a recipient of federal financial assistance." A042 ¶ 4.
- "Ms. Goldman requested an appointment for her son." A043 ¶ 11.
- Brooklyn Center's employee "told Ms. Goldman that [Brooklyn Center] would not provide an ASL interpreter." A043 ¶ 13.

- Brooklyn Center "refuses to hire qualified onsite sign language interpreters as a matter of policy and practice." A044 ¶ 22.

- Brooklyn Center, "as a health care provider, knew or should have known of its obligations under the ADA, Section 504, the NYHRJL, and the NYCHRL to provide accommodations to individuals with disabilities, including individuals who are deaf or hard of hearing." A044 ¶ 23.

- Brooklyn Center, "as a health care provider, knew or should have known that it had an obligation to individuals who are deaf or hard of hearing under the ADA, Section 504, the NYHRL, and the NYCHRL to develop policies to promote compliance with these statutes and to provide reasonable accommodations, including but not limited to the provision of an ASL interpreter, to ensure effective communication." A044 ¶ 24.

- Brooklyn Center's "staff knew or should have known that their actions and/or inactions created an unreasonable risk of causing [Goldman] greater levels of fear, anxiety, indignity, humiliation, and/or emotional distress than a hearing person would be expected to experience." A044 ¶ 25.

- Goldman "is aware of discriminatory barriers to access at [Brooklyn Center] and is thereby deterred from accessing [Brooklyn Center]'s healthcare services because of the discrimination she has faced and expects to face in the future." A045 ¶ 29.

- Brooklyn Center "discriminated against [Goldman] on the basis of her disability by . . . failing to ensure effective communication through the provision of onsite qualified sign language interpreters." A046 ¶ 39.

The Complaint includes allegations that do not require any intention to discriminate (A041–51 ¶¶ 1, 13, 29, 39, 49, 60, 61, 71), that expressly admit of the possibility of negligence (A044 ¶¶ 23, 24, 25), or that attribute the alleged discrimination to Brooklyn Center's "policy and practice," allowing for the possibility that any failure to accommodate was the result of decisions made at some

earlier point in time, rather than an in-the-moment decision driven by discriminatory animus (A044–48 ¶¶ 22, 27, 28, 40, 50).

These allegations triggered PIIC's duty to defend.

B. Claims that require no proof of wrongful intent are presumptively covered occurrences.

This case is complicated by the fact that different theories of liability supporting the claims in the *Goldman* Complaint are not separated across distinct counts in the Complaint. Rather, because each of the four statutory causes of action can be proved under either a disparate treatment theory or a failure-to-accommodate theory, each of the four counts in the Complaint contains allegations in support of both theories under one of the four statutes. *See* Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones.").

This means that allegations supporting a failure-to-accommodate theory are intermingled with allegations supporting intentional disparate treatment under each count. But it is immaterial that the Complaint also contains intentional allegations. *see*)Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency."); *see also Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 670 (1981) ("a policy protects against poorly or incompletely pleaded cases as well as those artfully drafted."). For purposes of insurance coverage

all that matters is that the *Goldman* Complaint includes at least one covered claim. *Fieldston Prop. Owners*, 16 N.Y.3d at 264.

Courts in other jurisdictions have addressed insurance defense coverage for complaints asserting causes of action that can be proved via multiple theories. The Seventh Circuit's decision in *Solo Cup Co. v. Federal Insurance Co.*, 619 F.2d 1178 (7th Cir. 1980), is instructive. *Solo* involved a dispute over an EEOC claim alleging discrimination on the basis of sex. Because the EEOC claim could support a theory of disparate treatment or disparate impact, and "EEOC would in all likelihood have been permitted to proceed under either theory," the duty to defend attached. *Id.* at 1185. The court in *Solo* noted that the EEOC complaint "included allegations of intentional discrimination," *Solo*, 619 F.2d at 1182, and the sole allegation quoted in the opinion is intentional, *id.* at 1184, but the court noted that "the allegations in the underlying EEOC complaint were so general that the EEOC would in all likelihood have been permitted to proceed under either theory." *Id.* at 1185. The Court required insurance coverage because of the possibility that the general language of the complaint could "contain a potential disparate impact claim" and "disparate impact liability does not require proof of discriminatory motive." *Id.* The *Goldman* Complaint presents a far stronger case for coverage than the complaint at issue in *Solo* in that it expressly alleges failure-to-accommodate claims.

Other courts have found that a complaint that sounds primarily in intentional conduct can nevertheless support a claim for negligence. See *Ron Tonkin Chevrolet Co. v. Continental Insurance Co.*, 126 Or. App. 712, 716 (1994) (because Title VII religious discrimination claim can be proved under either intentional discrimination or failure-to-accommodate theory, and because accommodation claim "need not be intentional," insurer was required to defend as a matter of law); *Amerisure Ins. Co. v. Laserage Tech. Corp.*, 2 F. Supp. 2d 296, 304 (W.D.N.Y. 1998) (finding a duty to defend after carefully parsing the complaint and identifying "certain paragraphs" that did not require intentionality and one cause of action that allowed liability "without regard to intent"); *cf. Baker v. 221 N. 9 St. Corp.*, No. 08-CV-03486 KAM MDG, 2010 WL 3824167 (E.D.N.Y. Sept. 23, 2010) (material facts that sound in intentionality — testimony that defendant struck plaintiff with a pint glass "in self-defense" — may nonetheless support a negligence claim, therefore triggering duty to defend).

Each of the four statutory causes of action in the Goldman Complaint can be proved under a failure-to-accommodate theory. *See* Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181; Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794); New York Human Rights Law § 290; New York City Human Rights Law (N.Y.C. Admin. Code § 8-101, *et seq.*). Moreover, Goldman explicitly pleaded a failure-to-accommodate theory in support of each of these

causes of action. A046 ¶ 39, A048 ¶ 49, A049 ¶ 60, A051 ¶ 71. *See also Goldman v. Brooklyn Ctr. for Psychotherapy, Inc.*, No. 15CV2572PKCLB, 2018 WL 1385888, at *4 (E.D.N.Y. Mar. 19, 2018) ("Plaintiff's discrimination claim is based on a reasonable accommodation theory.").

As a general matter, any discrimination claim premised on a theory of liability that need not be supported by allegations of discriminatory intent — *i.e.*, disparate impact or failure to accommodate — must be provided insurance defense coverage. This makes sense in light of the fact that intent is not an element of a disparate impact claim and therefore plays no role in the proof of the claim. Any disparate impact claim, therefore, regardless of whether intentional acts of discrimination have been pleaded, can be proved without reliance on those alleged acts. The same holds true for failure-to-accommodate claims. Because discriminatory intent is not an element of such a claim, it need not be pleaded, and, even if it is pleaded, it need not be proved.

The issue is even clearer when viewed from the defendant's perspective. Brooklyn Center, faced with the allegations in the *Goldman* Complaint, had to be prepared to defend against the possibility that Brooklyn Center could be found liable on the basis of the failure to provide an ASL interpreter alone, irrespective of any discriminatory intent. This is characteristic of failure-to-accommodate claims, where the plaintiff is not put to the burden of proving intentionality. Indeed, why

would a plaintiff who has alleged intentional disparate treatment also include allegations of failure to make reasonable accommodations? The obvious reason is to provide an alternate avenue for victory at trial even if intent cannot be proven. If the plaintiff is able to prove discriminatory intent, then the failure-to-accommodate claim adds nothing to plaintiff's case. It is only when discriminatory intent cannot be established that the failure-to-accommodate claim makes a difference.

In other words, even if Brooklyn Center were to successfully refute all evidence of discriminatory intent, or even if the plaintiff were to simply fail to put on any evidence of discriminatory intent, Brooklyn Center could nevertheless have been held liable if a jury found that its policies insufficiently accommodated the needs of the hearing impaired. Brooklyn Center's need to defend against a nonintentional failure-to-accommodate claim triggered PIIC's duty to defend.

It may be that the duty to defend does not attach in the unusual case where a cause of action that does not require intent is pleaded in such a way that intentional wrongdoing is necessarily part of the case. For example, in *Atlantic Mutual Insurance Co. v. Terk Technologies Corp.*, 309 A.D.2d 22, 32 (1st Dep't 2003), the underlying complaint alleged a violation of the Lanham Act, which does not require intent, but because "all of the factual allegations of the complaint are premised on intentional, 'knowing' conduct," the First Department found it "impossible to envision" how the violation could have occurred unintentionally. This is the

exception that proves the general rule that where a complaint provides an avenue for the plaintiff to prevail without proving wrongful intent, the insurer has a duty to defend.

C. Gratuitous allegations of wrongful intent do not relieve the obligation to defend against an otherwise covered claim.

But the standard for insurance defense coverage is not whether the allegations of the *Goldman* Complaint can support some claim that would not be covered by the Policy, but whether, read liberally, it can support *any* plausible covered non-intentional claim. Here, the Complaint supplies allegations that would have allowed Goldman to show at trial that Brooklyn Center, through mistake, miscalculation, or oversight, but without ill will or bad intent, adopted official policies that failed to go far enough in accommodating the reasonable needs of persons with disabilities. And such a theory, were it proven, would have been more than enough to prevail under any of the four pleaded anti-discrimination claims.

Although the *Goldman* Complaint also includes allegations of intentional discrimination, for purposes of the failure-to-accommodate theory of liability, these allegations are superfluous. Goldman could have omitted each and every allegation of intentional discrimination and still stated valid claims for failure to accommodate, and, crucially, Goldman could have prevailed at trial on her failure-to-accommodate claims, even if she failed to prove *any* of the allegations of intentional discrimination.

It would be perverse to allow a plaintiff to nullify a defendant's insurance coverage simply by pleading extraneous elements that it need not prove at trial.

In the context of policy exclusions, this Court has explained that an insurer is relieved of its obligation to defend where "no underlying cause of action could exist but for the existence of the excluded activity or state of affairs." *Inc. Vill. of Cedarhurst v. Hanover Ins. Co.*, 89 N.Y.2d 293, 304 (1996). Here, every allegation suggesting discriminatory intent could be stripped from the *Goldman* Complaint, and it would still state a viable claim for disability discrimination by failure-to-accommodate under each of the four statutory causes of action. *Cf. Fitzpatrick v. Am. Honda Motor Co.*, 78 N.Y.2d 61, 68–69 (1991) ("[A]n insured's right to a defense should not depend solely on the allegations a third party chooses to put in the complaint. . . . This observation is particularly apt in the context of New York's liberal pleading rules, which permit the pleadings to be amended to conform to the proof at any time, provided that no prejudice is shown.").

There is also a strong practical reason to disregard gratuitous allegations when determining insurance defense coverage. The alternate approach would give a plaintiff the ability, by strategic pleading, to eliminate defendants' insurance defense coverage without any corresponding limitation on the plaintiff's ability to prove its case. Indeed, this would provide a roadmap for plaintiffs' attorneys to maximize

settlement pressure by forcing defendants to bear litigation costs that should have been covered by insurance.

A plaintiff has significant ability to control how a case is litigated by choosing which claims to include and which to omit from the complaint. But such strategic omissions normally come with a cost. For example, a plaintiff in state court may choose not to plead a federal cause of action to avoid removal to federal court. But in doing so, that plaintiff gives up any broader theory of liability or more generous damages that the federal claim might have provided.

Under the approach advocated by PIIC, however, a plaintiff asserting a claim requiring no proof of intent can, simply by pleading gratuitous allegations of wrongful intent, deny defendant insurance coverage. Yet because intent is not an element of the claim, the plaintiff can nevertheless prevail without ever proving — or indeed even producing any evidence of — intent.

Consider, for example, an employment discrimination complaint alleging that a certain test given to job applicants had a disparate impact on a particular protected class. According to PIIC, by simply alleging that the test was intentionally adopted for the purpose of discriminating against that class, the plaintiff would enable defendant's insurer to disclaim all defense coverage. Yet the plaintiff's litigation strategy need not change in the slightest because this alleged discriminatory intent

need never be proved and would play no part in any instructions ultimately given to the jury.

It is easy to see why this theory might be appealing from the perspective of an insurance company looking to reduce its defense obligations, but it makes little sense in light of longstanding insurance defense principles which require an insurer to defend "whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim." *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169, 175 (1997).

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the affirmative. A claim for discrimination under a failure-to-accommodate theory is a covered "occurrence" under New York law and must be defended by a general liability insurance carrier.

Dated: July 6, 2020
Albany, New York

O'CONNELL & ARONOWITZ. P.C.

By: Michael Y. Hawrylchak

Jeffrey J. Sherrin
Michael Y. Hawrylchak
Attorneys for Plaintiff–Appellant
54 State Street
Albany, New York 12207
Tel: (518) 462-5601
Fax: (518) 462-2670

Email: mhawrylchak@oalaw.com

NEW YORK STATE COURT OF APPEALS
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Dated: July 6, 2020

Michael Y. Hawrylchak
Attorneys for Plaintiff–Appellant
54 State Street
Albany, New York 12207
Tel: (518) 462-5601

UNPUBLISHED DECISIONS

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United States District Court,
E.D. New York.

William G. BAKER, Plaintiff,
v.
221 NORTH 9 STREET CORPORATION d/b/a Capone's, Michael Kearney, Adrian Biltoft and John McGillion, Defendants.

No. 08–CV–03486 (KAM)(MDG).
|
Sept. 23, 2010.

Attorneys and Law Firms

Michael B. Doherty, Michael A. Murphy, Preti Flaherty Beliveau & Pachios LLP, Boston, MA, for Plaintiff.

Anne V. Malone, Thomas F. Callahan, Callahan & Malone, Mineola, NY, for Defendants.

MEMORANDUM & ORDER

MATSUMOTO, District Judge.

***1** Plaintiff William G. Baker ("plaintiff") brings this diversity action against defendant Adrian Biltoft ("defendant"), alleging claims of assault and/or battery and negligence arising out of an incident in which defendant struck plaintiff in the face with a glass object. [1] (Doc. No. 15, Third Amended Compl. and Demand for Jury Trial ("Compl.") ¶¶ 6, 8–12, 32–33, 35–37.) The assault and/or battery claim against defendant has since been dismissed as time-barred, and only the negligence claim remains. (Doc. No. 28, Stipulation of Dismissal as to Count V of the Third Amended Complaint ("Stipulation").) Defendant moves for summary judgment, pursuant to Federal Rule of Civil Procedure 56(b), arguing that, based on the undisputed facts, plaintiff's only viable cause of action is a claim for assault and/or battery, which has been dismissed, and that there is no set of facts that would satisfy the elements of a negligence claim. (Doc No. 55–56, Def.'s Mem. of Law ("Def.'s Mem.") at 5.) For the following reasons, defendant's motion for summary judgment is denied.

BACKGROUND [2]

I. The Incident

On the evening of May 25, 2005, plaintiff and defendant were involved in an altercation at Capone's, a bar in Brooklyn, New York. (Def.'s 56.1 Statement of Material Facts ("Def.'s 56.1") ¶¶ 1, 4, 7; Pl.'s 56.1 Statement of Material Facts ("Pl.'s 56.1") ¶¶ 1, 4, 7.) Both parties had been drinking. (Def.'s 56.1 ¶ 4; Pl.'s 56.1 ¶ 4; Affirmation in Supp., Ex. E, Def.'s Resp. to Interrogs. [3] ("Def.'s Resp. to Interrogs."), No. 5; Ex. D, Pl.'s Resp. to Interrogs. ("Pl.'s Resp. to Interrogs."), No. 3.) At some point during the night, defendant pointed at plaintiff. (Def.'s 56.1 ¶ 5; Pl.'s 56.1 ¶ 5.) Plaintiff subsequently approached defendant and asked him what his "problem" was. (Def.'s 56.1 ¶ 7; Pl.'s 56.1 ¶ 7; Affirmation in Supp., Ex. H, Pl.'s Dep. ("Pl.'s Dep.") at 90.) Defendant was holding a pint glass in his right hand at the time. (Def.'s 56.1 ¶ 6; Pl.'s 56.1 ¶ 6.) Thereafter, the parties' versions of the events diverge.

According to the defendant in his sworn initial responses to plaintiff's interrogatories, dated before the dismissal of plaintiff's assault and/or battery claim, "in response to a sudden, unprovoked attack by the plaintiff ... in self-defense," he "reflexively struck the plaintiff with a pint glass I was holding." [4] (Def.'s Resp. to Interrogs., No. 3.)

In defendant's deposition, taken after the assault and/or battery claim against him was dismissed, he further testified:

> A. ... I was standing next to [plaintiff], shoulder to shoulder. And I felt a shove from him on my right side.
>
> Q. But you did not see him do that?
>
> A: I guess you could say I didn't exactly see him do it.
>
> Q: Then what happened?
>
> A: And then he proceeded to tackle me and take me to the floor.
>
> Q: Did you have something in your hand at the time?
>
> ***2** A: Yes.
>
> Q: What did you have in your hand?
>
> A: A beer glass.
>
> ...

A. ... Anyway, he shoved me to the point I landed on my back, and he was on me.

Q. You fell back, you fell onto your back?

A. Yes.

Q. You held onto your pint glass?

A. I guess so, yes.

Q. And then you struck him on the head with it? Did I sum it up?

A. Well, during some point after being shoved and being on my back, I was—we were punching each other.

...

A. ... Between him shoving me and me landing on the ground, evidently, I was hitting him and struck him with the glass.

...

A. It was a split-second event. I landed on my back with him on top of me. We were both punching each other and the Plaintiff was pulled off of me.

...

Q. Did you strike my client with anything else other than the glass?

...

A. I recall when he was on me that I was attempting to hit him with my fist.

(Affirmation in Supp., Ex. G, Def.'s Dep. ("Def.'s Dep.") at 42–43, 45, 54–55.)

On the other hand, plaintiff denied making any physical contact with defendant at any point during their altercation, and avers that he was blindsided from behind by the pint glass. (Pl.'s 56.1 ¶ 11; Pl.'s Resp. to Interrogs., No. 3; Pl.'s Dep. at 103, 115–116.) Specifically, in his sworn response to defendant's interrogatories, plaintiff stated, "I recall that words were exchanged between my group and the [defendant's] group. I then recall being hit from behind and I was knocked unconscious." (Pl.'s Resp. to Interrogs., No. 3.) Furthermore, in his deposition, plaintiff testified:

Q. Were you standing face-to-face with [defendant] when he hit you with a pint glass?

A. I don't know. At that point I was blindsided and I don't know what position he came at me with the pint glass.

...

A. I recall telling [the police] we were in a bar and I got blindsided, and I don't know what happened for a few seconds and then I was covered in blood and I ran out the door.

...

Q. Did you ever tackle [the defendant]?

...

A. No, I didn't tackle him.

Q. Did you ever take a swing at him?

A. No.

Q. At any time before this incident, did you ever raise your arms in a defensive manner?

A. I can't recall.

(Pl.'s Dep. at 103, 115–16.)

Plaintiff maintains that he did not know that it was defendant who struck him until he read the police report. (Doc. No. 61, Pl.'s Aff. ("Pl.'s Aff.") ¶¶ 4–6.) The parties do not dispute that defendant is the only witness as to how the plaintiff was struck with the pint glass. (Doc. No. 59, Pl.'s Mem. of Law ("Pl.'s Mem.") at 1.) Plaintiff testified that "the way it was reported to me from all of my friends was that none of them saw [defendant] strike me." (Pl.'s Dep. at 71–72.)

As a result of being struck with the pint glass, plaintiff alleges that he suffered lacerations on his face and on his neck, requiring fifty stitches, and that he has and will continue to sustain severe emotional distress, economic losses and other damages and will require "unnecessary future surgery." (Pl.'s Dep. at 116–17; Compl. ¶¶ 11, 12, 37.) For these injuries, plaintiff alleges that he is entitled to at least $75,000 in compensatory damages. (Compl.¶¶ 6, 16, 25.)

II. The Causes of Action

***3** In plaintiff's Third Amended Complaint, he brings both a negligence claim and an assault and/or battery claim against defendant due to the incident.[5] Specifically, the negligence claim alleges that: (1) defendant "had a duty to [plaintiff] to act with reasonable care to avoid striking and/or injuring [plaintiff];" (2) "[d] efendant breached his duty to [plaintiff] by failing to act with reasonable care, and striking [plaintiff] with a glass bottle or other glass object;" and (3) that defendant's wrongful conduct directly and proximately caused plaintiff's injuries. (Compl.¶¶ 35–37.) The assault and/or battery claim alleges that defendant "intentionally, and without consent, struck [him] with a glass bottle or other glass object." (*Id.* at ¶ 32.) Plaintiff has since dismissed the assault and/or battery claim against defendant as the statute of limitations for that claim has run. (*See* Stipulation.) Thus, only the negligence claim remains against defendant.

DISCUSSION

I. Summary Judgment Standard

"Summary judgment is a tool to winnow out from the trial calendar those cases whose facts predestine them to result in a directed verdict." *United Nat'l Ins. Co. v. Tunnel, Inc.,* 988 F.2d 351, 355 (2d Cir.1993). To prevail on a motion for summary judgment, the moving party must show that there is no genuine, triable issue of material fact, and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(c)(2). A fact is considered material "if it 'might affect the outcome of the suit under the governing law,' " and an issue of fact is a genuine one where " 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Holtz v. Rockefeller & Co. Inc.,* 258 F.3d 62, 69 (2d Cir.2001) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The moving party may discharge its initial burden by demonstrating that there is an absence of evidence to support the non-moving party's case on an issue for which the non-moving party bears the burden of proof at trial. *Celotex,* 477 U.S. at 322–23.

The burden then shifts to the non-moving party. In order to defeat a motion for summary judgment, the non-moving party "may not rely on mere conclusory allegations [or] speculation" in demonstrating the existence of a genuine, triable issue of material fact. *Golden Pac. Bancorp. v. FDIC,* 375 F.3d 196, 200 (2d Cir.2004) (citation omitted). Instead, the non-moving party "must come forth with evidence sufficient to allow a reasonable jury to find in [his] favor." *Brown v. Henderson,* 257 F.3d 246, 252 (2d Cir.2001) (citation omitted).

In considering a summary judgment motion, the court must view all evidence in the light most favorable to the non-moving party and draw all reasonable inferences in his favor. *Amnesty America v. Town of W. Hartford,* 361 F.3d 113, 122 (2d Cir.2007) (citation omitted).

II. The Parties' Arguments

A. Defendant's Arguments

***4** Defendant argues that the undisputed material facts establish that he is entitled to summary judgment on plaintiff's negligence claim. (Def.'s Mem. at 5.) Specifically, defendant argues that the undisputed facts—that defendant pointed at plaintiff, that plaintiff approached defendant in response to the pointing, and that at some point thereafter, plaintiff was hit with a glass object defendant was holding—establish that plaintiff's cause of action is founded solely in assault and/or battery, which requires intent, and that there is no set of facts that would support plaintiff's negligence claim. (*Id.* at 6–7.) Defendant bolsters this argument by pointing to his admission that he punched plaintiff and hit him with the glass, and stating that this admission is sufficient to establish intentional conduct. (*Id.* at 10; *see* Def.'s Dep. at 54–55 (Q. "Did you strike my client with anything other than the glass?" ... A. "I recall when he was on me that I was attempting to hit him with my fist."); *see also* Def.'s Resp. to Interrogs., No. 3 ("[I]n response to a sudden, unprovoked attack by the plaintiff ... in self-defense I reflexively struck the plaintiff with a pint glass I was holding.") Defendant further argues that his testimony that he acted in self-defense defeats plaintiff's negligence claim because self-defense presupposes intent and is a defense to the intentional tort of battery.[6] (Doc. No. 63, Def.'s Reply Affirmation ("Def.'s Reply") ¶¶ 19–21 (citing the Restatement (Second) of Torts §§ 63–76 & N.Y. Pattern Jury Instructions—Civil, Vol. 2 at 7).)

Consequently, defendant argues he would still be liable for assault and/or battery as opposed to negligence even if he did not intend to injure plaintiff, because he intended to and did engage in offensive bodily contact with plaintiff. (Def.'s Mem. at 11–12.) Defendant supports his argument by citing New York's adoption of the Restatement (Second) of Torts § 16(1) (1965),[7] which states that if a defendant acts with the intention of inflicting offensive, but not harmful bodily

contact, the defendant is liable for any resulting bodily harm, whether intended or not. (*Id.* at 12); *see also Trott v. Merit Dep't Store,* 106 A.D.2d 158, 484 N.Y.S.2d 827, 829 (1st Dep't 1985) (adopting the Restatement (Second) of Torts § 16(1)).

Finally, defendant argues that plaintiff is essentially bringing a "negligent assault" claim, a cause of action not recognized under New York law. *See Barraza v. Sambade,* 212 A.D.2d 655, 622 N.Y.S.2d 964, 965 (2d Dep't 1995) ("[I]t is well settled that no cause of action for negligent assault exists in New York.") (citations omitted). Defendant posits that plaintiff is bringing his negligent assault claim "in response to the fact that ... the one year limitations period for intentional torts has expired." (Def.'s Mem. at 7.) Contrary to plaintiff's allegations of negligence, defendant asserts that his actions "clearly meet[ ] the court's criteria for an intentional act," and that plaintiff's allegation that defendant's actions are negligent is an unsound attempt to "exalt form over substance." (*Id.* at 9, 622 N.Y.S.2d 964 (quoting *Schetzen v. Robotsis,* 273 A.D.2d 220, 709 N.Y.S.2d 193, 194 (2d Dep't 2000).)

B. Plaintiff's Argument

***5** In response, plaintiff argues there is a disputed issue of material fact as to whether defendant struck him intentionally or negligently, and points to defendant's own testimony that defendant "reflexively" struck plaintiff with the pint glass "in self-defense." (Pl.'s Mem. at 1–2; *see also* Def.'s Resp. to Interrogs., No. 3.) "Reflexively" striking someone, plaintiff argues, is not an intentional act, but instead demonstrates a complete lack of intent. [8] (Pl.'s Mem. at 2.) Plaintiff relies on the definition of "reflexive" in Merriam–Webster's Collegiate Dictionary, Eleventh Edition (2003) as "[c]haracterized by habitual and unthinking behavior." (*Id.*)

Plaintiff further argues that there is a disputed issue of fact as to whether defendant acted in "self-defense" because plaintiff claims that he did not tackle defendant before being struck with the pint glass. (*Id.* at 1–2.) Moreover, the court notes that the parties also dispute whether plaintiff made any physical contact with defendant prior to defendant striking plaintiff with the pint glass. (*Compare* Pl.'s Resp. to Interrogs., No. 3 *with* Def.'s Resp. to Interrogs., No. 3.)

Finally, plaintiff maintains that he is not bringing a "negligent assault" claim because "there is a dispute as to whether an intentional assault occurred" and that defendant's attempt to use the Restatement (Second) of Torts §§ 16(1) as a shield from liability is simply an attempt "to change the discussion from intentional action to intent to injure." (*Id.* at 3 & n. 3 (The "issue in this case is whether the Defendant intentionally struck Mr. Baker, and not whether he intended to injure Mr. Baker.").)

III. Analysis

There is clearly a disputed issue of fact as to whether defendant struck plaintiff with the pint glass "intentionally" or "reflexively" or in "self-defense." The question is whether, even if a jury credits plaintiff's proffered version of the events—namely, that defendant struck plaintiff "reflexively" in "self-defense"—such conduct is a negligent act under New York law. Thus, for the purpose of considering defendant's motion, the court will assume that defendant indeed "reflexively" struck plaintiff with a pint glass "in self-defense," regardless of whether this phrasing by defendant was simply legal posturing to avoid the subsequently dismissed assault and/or battery claim. (Def.'s Resp. to Interrogs., No. 3.) As required in considering a motion for summary judgment, the court views all evidence in the light most favorable to the plaintiff and draws all reasonable inferences in plaintiff's favor in this analysis. *Amnesty,* 361 F.3d at 122.

A. Self–Defense

Generally, self-defense is an admission of, and defense to, an intentional act. *See, e.g., Carp v. Marcus,* 138 A.D.2d 775, 525 N.Y.S.2d 395, 397 (3d Dep't 1988) (holding self-defense to be an affirmative defense to assault and battery). Although plaintiff has demonstrated that there are disputed issues of material fact precluding summary judgment on whether defendant acted in "self-defense, the assault/and or battery claim is the only intentional tort alleged against defendant and has been dismissed. Thus, the self-defense assertion by defendant in his discovery responses but not in his Answer need not be considered.

***6** In the instant case, however, defendant testifies seemingly inconsistently that he struck plaintiff both "reflexively" and in "self-defense." (Def.'s Resp. to Interrogs., No. 3.) As will be discussed below, because a reflexive act could be a negligent act under New York law, the court must determine whether there are disputed issues of fact as to whether defendant acted reflexively. The record before the court reveals that there are clearly issues of fact as to whether plaintiff initiated contact with defendant, thus prompting defendant's "reflexive" response, or whether

plaintiff was hit from behind.[9] Indeed, the same disputed issues of fact as to whether defendant acted in self-defense are relevant to whether the defendant reacted reflexively in response to any act by the plaintiff.

B. Reflexive Actions

Viewing all evidence in the light most favorable to the non-moving plaintiff and drawing all reasonable inferences in his favor, *Amnesty,* 361 F.3d at 122, the court assumes that defendant committed a "reflexive act" based on his use of the word "reflexively" when testifying about his actions in striking plaintiff with a pint glass. Such an interpretation is not without precedent. *See, e.g., New York Cent. Mut. Fire Ins. Co. v. Steely,* 29 A.D.3d 967, 815 N.Y.S.2d 724, 725 (2d Dep't 2006) (interpreting an action taken in reflexive self-defense to be a reflexive action). Under New York law, a "reflexive" act is an unintentional act. *See, e.g., People v. Wheeler,* 234 A.D.2d 573, 652 N.Y.S.2d 59, 60 (2d Dep't 1996) (differentiating between intentional and reflexive actions, describing the latter as done "without any awareness"); *see also People v. Fernandez,* 64 A.D.3d 307, 879 N.Y.S.2d 74, 79 (1st Dep't 2009) (defining a "reflexive action" as an "unthinking action" in context of a criminal case).

Contrary to plaintiff's argument, although a "reflexive" act is always unintentional, it is not automatically "negligent." *See, e.g., Dibble v. New York City Transit Auth.,* No. 116779–06, 2010 N.Y.App. Div. LEXIS 5367, at *14 (1st Dep't June 22, 2010) ("[T]he jury improperly equated negligence with possession of a motor skill that is essentially a reflex action."). Some courts have held, however, that a reasonable jury could find a reflexive act to be negligent. For example, in *Steely,* the defendant claimed that he "physically struck" the plaintiff due to a "reflex reaction," which was "triggered" by the plaintiff assaulting him. *Steely,* 815 N.Y.S.2d at 725. Based on the *Steely* defendant's testimony that his actions were reflexive, the Appellate Division found that the Supreme Court correctly held that there were "triable issues of fact as to whether the incident was an 'occurrence' covered by the relevant insurance policy, specifically *whether the conduct of the insured was negligent, rather than intentional"* and properly denied plaintiff's motion for summary judgment. *Id.* (emphasis added); *see also Topps v. Ferraro,* 235 Ill.App.3d 43, 175 Ill.Dec. 895, 601 N.E.2d 292, 295–96 (Ill.App.Ct.1992) (reversing the trial court's grant of summary judgment on plaintiff's negligence claim where defendant testified at his deposition that he reflexively struck the plaintiff in the face after plaintiff shoved him, holding that an "issue of material fact existed as to the nature of defendant's conduct as reasonable minds could find that the defendant was negligent in hitting the plaintiff"). Accordingly, the court finds a reflexive act could be a negligent act under New York law.

***7** Further, in the present case, there are facts from which a reasonable jury could find in plaintiff's favor on a negligence claim. Here, defendant, who is allegedly the only witness as to how plaintiff was struck with the pint glass testified that he struck plaintiff with the pint glass "reflexively," which, as discussed, New York case law recognizes as an unintentional, and a potentially negligent act. From the testimony of the plaintiff and defendant, a reasonable jury could find that defendant had a duty to act with reasonable care and breached that duty by becoming so intoxicated that he struck plaintiff with a pint glass as a reflex given the circumstances. Further, a reasonable jury could find that that breach proximately and directly caused plaintiff's injuries. *See, e.g.,* Restatement (Second) of Torts § 283C, comment d ("A drunken man may still act in all respects as reasonably as one who is sober; and if he does so, he is not negligent. If, however, his conduct is not that of a reasonable man who is sober, his voluntary intoxication does not excuse him from liability."); *Rodak v. Fury,* 31 A.D.2d 816, 298 N.Y.S.2d 50, 53 (2d Dep't 1969) (citing Restatement (Second) of Torts § 283C, comment d and stating "[i]ntoxication in itself is not negligence as a matter of law but may be considered by the jury with the other facts in the case").

Consequently, because there is authority for the proposition that a reflexive act can be considered a negligent act under New York law, and because there are facts upon which a reasonable jury could find defendant's reflexive actions to be negligent, there is a genuine issue of material fact requiring a trial over whether the defendant struck plaintiff negligently.

C. Defendant's Remaining Arguments

Defendant's remaining arguments that plaintiff is attempting to bring a non-cognizable "negligent assault" claim against him, and that the Restatement (Second) of Torts § 16(1) shields him from liability under a negligence theory, are unavailing. (Def.'s Mem. at 6–12.)

Defendant argues that because his actions "clearly meet[ ] the court's criteria for an intentional act," plaintiff's attempt to characterize those actions as "negligent" is equivalent to raising a "negligent assault" claim. (*Id.* at 9, 298 N.Y.S.2d 50.) Defendant's argument that plaintiff has raised a "negligent

assault" claim, however, presupposes that defendant's striking of plaintiff was indeed an intentional act, the primary issue that is in dispute in this case. *See, e.g., Panzella v. Burns,* 169 A.D.2d 824, 565 N.Y.S.2d 194, 195 (2d Dep't 1991) ("It is well-established that *once intentional offensive contact has been established,* the actor is liable for assault and not negligence." (emphasis added).)

As plaintiff argues, the cases cited by defendant in support of his "negligent assault" argument are distinguishable from this case because, in each of those cases, it was undisputed that the defendant engaged in intentional conduct to harm the plaintiff. (Pl.'s Mem. at 3.) For example, in *Barraza,* 622 N.Y.S.2d at 965, it was undisputed that the defendant intentionally stabbed the plaintiff. In *Salimbene v. Merchants Mut. Ins. Co.,* 217 A.D.2d 991, 629 N.Y.S.2d 913, 916 (4th Dep't 1995), it was undisputed that one party intentionally stoned another party's vehicle. Similarly in both *Panzella,* 565 N.Y.S.2d at 195, and *Sanchez v. Wallkill Cent. Sch. Dist.,* 221 A.D.2d 857, 633 N.Y.S.2d 871, 871 (3d Dep't 1995), it was undisputed that the respective defendants intentionally punched the respective plaintiffs without testimony by defendants of reflexive acts. Likewise, in *Mazzaferro v. Albany Motel Enter.,* 127 A.D.2d 374, 515 N.Y.S.2d 631, 632 (3d Dep't 1987), it was undisputed that the defendants intentionally assaulted the plaintiff. Finally, neither *Richman v. Nussdorf,* 203 A.D.2d 548, 612 N.Y.S.2d 933 (2d Dep't 1994) nor *Schetzen,* 273 A.D.2d 220, 709 N.Y.S.2d 193, contain sufficient facts for the court to deem them applicable to and controlling in the present case.[10] Consequently, where, as here, there is a disputed issue of fact as to whether any intentional conduct took place, the court does not accept defendant's argument that plaintiff's negligence claim is, in substance, a claim for "negligent assault."

***8** Defendant further argues that because he intentionally engaged in offensive bodily contact with plaintiff, even if he did not intend to cause plaintiff's specific injuries, he would be liable for assault rather than negligence under New York's adoption of the Restatement (Second) of Torts § 16(1). (Def.'s Mem. at 12.) However, like his previous argument, defendant's argument that the Restatement (Second) of Torts § 16(1) shields him from liability under a negligence theory presumes the resolution in his favor of an issue that is in dispute: whether defendant engaged in intentional offensive bodily contact with plaintiff. *Cf. Trott,* 484 N.Y.S.2d at 829 (finding assault occurred where it was undisputed that the defendant intentionally fired a gun to frighten the plaintiff and inadvertently shot him).

As previously discussed, there is a disputed issue of material fact as to whether defendant engaged in intentional offensive bodily contact with plaintiff by striking him with the glass, or whether the act was a reflexive response to the situation. (*Compare* Pl.'s Resp. to Interrogs., No. 3 (Plaintiff states, "I recall that words were exchanged between my group and the other group. I then recall being hit from behind and I was knocked unconscious.") *with* Def.'s Resp. to Interrogs., No. 3 (Defendant states, "in response to a sudden, unprovoked attack by the plaintiff ... in self-defense I reflexively struck the plaintiff with a pint glass I was holding.").) As plaintiff argues, the "issue in this case is whether the [d]efendant intentionally struck Mr. Baker, and not whether he intended to injure Mr. Baker." (Pl.'s Mem. at 3 n. 3). Accordingly, because there is a disputed issue of fact as to whether the defendant intentionally struck plaintiff, defendant's argument that the Restatement (Second) of Torts § 16(1) shields him from a negligence claim is misplaced.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is denied. The parties are ordered to obtain and exchange revised demands and offers, to engage in good faith settlement negotiations and to appear for a settlement conference before Magistrate Judge Go. By 11/5/10, the parties shall file a joint letter via ECF regarding the outcome of their settlement efforts and inform the court whether they plan to engage in further settlement discussions or whether they intend to proceed to trial.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3824167

Footnotes

1 The other defendants in the case, John McGillion, Michael Kearney, and 221 North 9 Street Corporation d/b/a/ Capone's have defaulted and do not join in the present motion. (Doc. No. 22–24, Entries of Default as to John McGillion, Michael Kearney, and 221 North 9, Street Corporation.)

2 The following facts, taken from the parties' statements pursuant to Local Civil Rule 56.1, are undisputed unless otherwise indicated. References to paragraphs of the parties' 56.1 statements include materials cited therein and annexed thereto.

3 Defendant submits, and both parties cite to, Defendant's Supplemental Responses to Plaintiff's Interrogatories. (Doc. No. 53–54, Affirmation in Supp., Ex. F, Def.'s Supplemental Resp. to Interrogs. ("Def.'s Supplemental Resp. to Interrogs."), No. 3.) However, Defendant's Supplemental Responses to Plaintiff's Interrogatories was neither sworn to nor signed by the defendant, as required by Federal Rule of Civil Procedure 33. Thus, Defendant's Supplemental Responses to Plaintiff's Interrogatories are not admissible evidence and cannot be considered by the court on the defendant's motion for summary judgment. *See, e.g., Universal Calvary Church v. City of New York,* No. 96–CV–4606, 2000 WL 1538019, at *44 n. 46 (S.D.N.Y. Oct. 17, 2000) (declining to consider plaintiff's unsigned answers to interrogatories on motion for summary judgment). However, as will be discussed, defendant's statement that he "reflexively" struck plaintiff with the pint glass "in self-defense" is contained in defendant's signed and sworn initial Response to Plaintiff's Interrogatories, in addition to Defendant's Supplemental Responses to Plaintiff's Interrogatories. Thus, the exclusion of the Supplemental Responses to Plaintiff's Interrogatories does not change the facts relied upon by the court in its determination.

4 Plaintiff repeatedly points to defendant's sworn and unsworn responses to plaintiff's interrogatories, both dated before the dismissal of plaintiff's assault and/or battery claim, that defendant "reflexively" struck plaintiff with the pint glass "in self-defense" as the centerpiece of plaintiff's argument that there is a disputed issue of fact surrounding defendant's actions and that a reasonable jury could find defendant liable for negligence. (Pl.'s Mem. at 1–2 (quoting Def.'s Supplemental Resp. to Interrogs., No. 3); Def.'s Resp. to Interrogs., No. 3.)

5 Plaintiff maintains that he initially brought both a negligence and assault and/or battery claim because he did not see defendant hit him with the pint glass and thus did not know whether a negligent or intentional act had occurred. (Pl.'s Mem. at 3–4.)

6 Defendant did not assert self-defense as an affirmative defense in his Answer. (*See* Doc. No. 16, Def.'s Answer to Am. Compl.)

7 "If an act is done with the intention of inflicting upon another an offensive but not a harmful bodily contact, or of putting another in apprehension of either a harmful or offensive bodily contact, and such act causes a bodily contact to the other the actor is liable to the other for a battery although the act was not done with the intention of bringing about the resulting bodily harm." Restatement (Second) of Torts § 16(1) (1965).

8 Plaintiff contends that defendant phrased his responses to plaintiff's interrogatories to suggest that he did not intentionally strike plaintiff with the pint glass because defendant's insurance policy, which plaintiff asserts defendant has failed to provide in the course of discovery, would not cover defendant if he admitted to assault and/or battery. (Pl.'s Mem. at 2.) Plaintiff contends that now that that the assault and/or battery claim has been dismissed, it is beneficial for both defendant and his insurance company to claim defendant intentionally struck plaintiff with the pint glass. (*Id.*) Plaintiff further argues that even if defendant's phrasing of his response to interrogatories was simply legal posturing, defendant should not be entitled to summary judgment because his legal posturing created an issue of material fact. (*Id.* at 2–3.) In response, defendant argues that "plaintiff's discussion of insurance coverage is improper, irrelevant and speculative and should not be given any consideration by this court." (Def.'s Reply ¶ 33.)

9 The court notes that provocation in the form of bodily contact is not necessary to trigger a reflexive action. *See, e.g., Codling v. City of New York,* No. 01–CV–2884, 2002 U.S. Dist. LEXIS 16547, at *15 (S.D.N.Y. Sept. 5, 2002), *rev'd on other grounds,* 68 Fed. Appx. 227, 229 (2d Cir.2003) (holding that a reasonable jury could find that an officer did not have probable cause to arrest a woman who claimed to have pushed a bullhorn into his face "reflexively" in "self-defense" when he positioned the bullhorn inches from her face). A jury could find that plaintiff, by approaching defendant and asking him what his "problem" was, could have triggered a reflexive reaction by defendant. Additionally, a jury could find that the position of plaintiff's hands as he approached defendant, which plaintiff admittedly does not recall, could also have triggered a reflexive reaction by defendant.

10 Defendant disagrees with plaintiff's argument that *Schetzen,* 273 A.D.2d 220, 709 N.Y.S.2d 193, "contains no facts." (Def.'s Reply ¶¶ 29–30.) While the opinion summarizes the allegations and the conclusion of the court, it does not provide the facts upon which the court relied to arrive at its conclusion. *Schetzen,* 709 N.Y.S.2d at 194 ("Contrary to plaintiffs' contentions, if, based on a reading of the factual allegations, the essence of the cause of action is, as here, assault...."). Thus this court cannot adequately analyze and analogize *Schetzen* in the context of the present case.

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766 Fed.Appx. 515
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Steven J. BERNS, an individual residing in the State of California, Plaintiff-Appellant,
v.
SENTRY SELECT INSURANCE COMPANY, an Illinois corporation, Defendant-Appellee.

No. 17-56264
|
Argued and Submitted March 6, 2019 Pasadena, California
|
Filed March 29, 2019

Synopsis

Background: Insured brought action against insurer that issued commercial general liability insurance policy, asserting claims for breach of contract and bad faith and alleging that insurer refused to defend and indemnify him in wrongful-termination suit. The United States District Court for the Central District of California, Dale S. Fischer, J., 2014 WL 2808192, entered summary judgment in favor of insurer. Insured appealed. The Court of Appeals, 656 Fed.Appx. 326, reversed and remanded. On remand, the District Court, No. 2:13-cv-01611-DSF-AGR, Fischer, J., 2017 WL 4676568, granted summary judgment in favor of insurer on bad-faith claim. Insured appealed.

Holdings: The Court of Appeals held that:

insurer did not engage in bad faith when it refused to defend and indemnify insured based on exclusion for intentional acts;

insurer did not engage in bad faith when it delayed in indemnifying insured until court determined meaning of "intentional"; and

insurer's invocation of attorney-client privilege did not constitute bad faith.

Affirmed.

Attorneys and Law Firms

***516** Merak Eskigian, Esquire, Attorney, Mark Goshgarian, Esquire, Attorney, Goshgarian & Associates, PLC, Calabasas, CA, for Plaintiff - Appellant

Eldon S. Edson, Esquire, Laura Ramos, Esquire, Attorney, Selman Breitman LLP, Los Angeles, CA, for Defendant - Appellee

Appeal from the United States District Court for the Central District of California, Dale S. Fischer, District Judge, Presiding, D.C. No. 2:13-cv-01611-DSF-AGR

Before: KLEINFELD, GILMAN, * and NGUYEN, Circuit Judges.

MEMORANDUM **

Plaintiff Steven J. Berns appeals the district court's grant of summary judgment in favor of Sentry Select Insurance Company on the issue of Berns's remaining cause of action for bad faith breach of the duty to defend. We AFFIRM.

Berns was insured under an insurance policy issued by Sentry. The insurance policy stated that Sentry would defend Berns for an "act" of "wrongful termination" or "harassment" committed in the course of his employment, with the exception of any "dishonest, malicious, fraudulent, criminal or intentional 'act.' " On September 1, 2011, Berns's sister Sue Porter sued Berns for wrongful termination and harassment. Berns requested that Sentry defend him, and Sentry denied his tender of defense, reasoning that his acts were "intentional," thus falling within the policy's exclusion for "intentional" acts. Sentry interpreted "intentional" to mean "voluntary and deliberate." Berns sued for breach of contract and bad faith. In 2016, we ruled in favor of ***517** Berns on his breach-of-contract claim, holding that "intentional" required "some sort of wrongful conduct, not just any purposeful act." Berns v. Sentry Select Ins. Co., 656 F. App'x 326, 327 (9th Cir. 2016). Sentry then paid Berns his defense fees, which left his bad-faith claim pending. The district court subsequently granted summary judgment

in favor of Sentry on the bad faith claim. We affirm because Berns has not showed that Sentry acted in bad faith.

"To establish a bad faith claim, the insured must show that (1) benefits due under the policy were withheld and (2) the reason for withholding the benefits was unreasonable or without proper cause." Century Sur. Co. v. Polisso, 139 Cal.App.4th 922, 43 Cal.Rptr.3d 468, 487 (2006), as modified on denial of reh'g (June 16, 2006).

In order to constitute "bad faith," there must be more than just an insurer's contractual breach or mistaken judgment. Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co., 90 Cal.App.4th 335, 108 Cal.Rptr.2d 776, 783 (2001). Berns has shown merely that the insurance company incorrectly denied him policy benefits, not that it acted in bad faith.

Berns had to show that Sentry was guilty of more than a mere "honest mistake, bad judgment or negligence." Id. Because Berns has not shown a "conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement," id., he has not shown bad faith.

Although an insurer's denial must be reasonable under all the circumstances, here, Sentry did not act unreasonably in interpreting the term "intentional" to mean "voluntary." California law was then mixed as to the definition of "intentional." Some California cases interpreted the term "intentional" broadly. See, e.g., B & E Convalescent Ctr. v. State Comp. Ins. Fund, 8 Cal.App.4th 78, 9 Cal.Rptr.2d 894, 907 (1992) ("It is well established and generally self-evident that the act of terminating an employee is an intentional act."). Some cases interpreted "intentional" as requiring a specific intent to inflict injury. See, e.g., Gonzalez v. Fire Ins. Exch., 234 Cal.App.4th 1220, 184 Cal.Rptr.3d 394, 410 (2015) ("[E]ven an act which is 'intentional' or 'willful' within the meaning of traditional tort principles will not exonerate the insurer from liability under Insurance Code section 533 unless it is done with a 'preconceived design to inflict injury.' " (quoting Republic Indem. Co. v. Superior Court, 224 Cal.App.3d 492, 273 Cal.Rptr. 331, 337 (1990)) (alteration in original)). In light of this uncertainty, Sentry relied on an Eleventh Circuit case interpreting the term "intentional" in the context of an insurance-policy coverage dispute. See Universal Underwriters Ins. Co. v. Stokes Chevrolet, Inc., 990 F.2d 598, 604 (11th Cir. 1993). Because bad faith "implies unfair dealing rather than mistaken judgment," Chateau Chamberay, 108 Cal.Rptr.2d at 783 (quoting Congleton v. Nat'l Union Fire Ins. Co., 189 Cal.App.3d 51, 234 Cal.Rptr. 218, 222 (1987)), and the authorities were divided, Sentry is not liable for bad faith.

Although Berns is correct that the district court was bound by our prior holding in this case, our interpretation of the word "intentional" as requiring a wrongful intent has no bearing on whether Sentry, at the time of its coverage denial (which was of course prior to our 2016 decision), acted reasonably in interpreting the word "intentional" as it did. See Berns, 656 F. App'x at 328. Sentry could not have known precisely how we would rule on this issue.

***518** Additionally, while Berns takes issue with Sentry's investigation and delay in paying him, he has not shown a "conscious and deliberate act" to frustrate his contractual rights. See Chateau Chamberay, 108 Cal.Rptr.2d at 783. He has shown merely that Sentry waited until a court determined the meaning of "intentional" in his contract to pay him what, as a result of that ruling, it owed.

Lastly, Berns's argument that Sentry acted in bad faith by invoking the attorney-client privilege to protect communications lacks merit. Sentry was not required to provide their privileged communications to him. Although Berns cites cases that he claims show there can be exceptions to the attorney-client privilege when "fairness requires" or a party uses it as a "sword and a shield," the cases that he cites do not apply here because they involve advice-of-counsel defenses, attorney disparagement, and the trade-secrets privilege. For instance, in United States v. Amlani, we held that the defendant waived attorney-client privilege when the defendant made a claim of attorney disparagement. 169 F.3d 1189, 1191 (9th Cir. 1999). In Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc., the defendant waived the advice-of-counsel defense by invoking the attorney-client privilege. 259 F.3d 1186, 1196 (9th Cir. 2001). In Chevron Corp. v. Pennzoil Co., the defendant waived attorney-client privilege by invoking the advice-of-counsel defense. 974 F.2d 1156, 1162 (9th Cir. 1992). Steiny & Co. v. California Electric Supply Co. did not involve the attorney-client privilege. 79 Cal.App.4th 285, 93 Cal.Rptr.2d 920 (2000). Steiny & Co. involved the trade-secrets privilege. See id. In this case, Sentry has not raised any advice-of-counsel defense nor a claim of attorney disparagement. No exception to the attorney-client privilege

applies, and as a result, Sentry did not act in bad faith in asserting the privilege.

For these reasons, we **AFFIRM**.

All Citations

766 Fed.Appx. 515

Footnotes

* The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

2016 WL 8461191
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Wanna BERRY-MAYES, as Administrator
FOR the ESTATE OF Andre BERRY, Plaintiff,
v.
NEW YORK HEALTH AND
HOSPITALS CORP., Defendant.

14-cv-9891 (PKC)
|
Signed 09/19/2016

Attorneys and Law Firms

Andrew Rozynski, Leah Wiederhorn, Philip Marcel Black, Seth Asher Nadler, Eric Baum, Simon, Eisenberg & Baum, LLP, New York, NY, for Plaintiff.

Carolyn Elizabeth Kruk, NYC Law Department, New York, NY, for Defendant.

MEMORANDUM AND ORDER

P. Kevin Castel, United States District Judge

***1** Plaintiff Wanna Berry-Mayes is the administrator of the estate of her deceased uncle, Andre Berry. Andre Berry was a deaf man who communicated using sign language and had, at most, limited speaking abilities. In the final years of his life, his serious medical conditions included end-stage renal disease, diabetes, hypertension and HIV. In 2012 and 2013, he was treated several times at Lincoln Hospital and Jacobi Hospital, both of which are located in the Bronx and are part of the New York City Health and Hospitals Corporation (the "HHC"). Andre Berry died at his home in November 2013 at the age of 52.

The administrator of Mr. Berry's estate brings this action against the HHC, asserting asserts that during his visits to Jacobi Hospital and Lincoln Hospital, the HHC failed to provide him with the reasonable accommodations necessary to facilitate communication, specifically including a sign-language interpreter. The administrator brings claims under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (the "ADA"), section 504 of the Rehabilitation Act, 29 U.S.C. § 794, the New York State Human Rights Law, N.Y. Exec. L. § 290 et seq. (the "NYSHRL") and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101, et seq. (the "NYCHRL"). She seeks a declaratory judgment stating that the HHC failed to provide reasonable accommodation to Andre Berry under these statutes, as well as compensatory and punitive damages.

Discovery in this case is now closed. The HHC and Berry-Mayes have both filed motions for summary judgment. (Docket # 31, 43.) For the reasons explained, the Court concludes that no reasonable jury could find that the HHC violated the ADA or the Rehabilitation Act. Separately, Mr. Berry's administrator has not identified a "useful purpose" for the entry of declaratory judgment and has not come forward with the evidence of deliberate indifference required to award compensatory damages under federal law. The HHC's motion for summary judgment is therefore granted as to both federal claims, and the plaintiff's summary judgment motion is denied. Because the two federal claims are dismissed, the Court declines to exercise supplemental jurisdiction over the remaining claims brought under the NYSHRL and the NYCHRL.

BACKGROUND.

Denise Berry is the sister of Andre Berry, and she testified in a deposition about her brother's disabilities and certain observations that she made during his hospitalization. Plaintiff Wanna Berry-Mayes is Denise Berry's daughter and Andre Berry's niece, and is the administrator of Andre Berry's estate. The Court refers to these three individuals as "Andre," "Denise" and "Berry-Mayes."

Andre, who was deaf, suffered from several serious medical conditions, including end-stage renal disease, diabetes, hypertension and HIV. (Pl. 56.1 ¶¶ 3, 4; Def. 56.1 Resp. ¶¶ 3, 4; Def. 56.1 ¶ 20; Pl. 56.1 Resp. ¶ 20.) He died in his home of hypertensive cardiovascular disease on November 5, 2013, at the age of 52. [1] (Pl. 56.1 ¶ 5; Def. 56.1 Resp. ¶ 5; Def. 56.1 ¶ 23; Pl. 56.1 Resp. ¶ 23.) On several occasions in 2012 and 2013, he received medical treatment at Lincoln Hospital and Jacobi Hospital, both of which are part of the HHC system. (Pl. 56.1 ¶ 4; Def. 56.1 Resp. ¶ 4.)

***2** Andre knew American Sign Language ("ASL") and communicated using ASL. (Pl. 56.1 ¶ 15; Def. 56.1 Resp. ¶ 15; Def. 56.1 ¶ 6; Pl. 56.1 Resp. ¶ 6.) The defendant asserts that Andre "could read lips" and often communicated through lip reading, whereas the plaintiff contends that Andre's lip-

reading skills were "at most" limited. (Def. 56.1 ¶ 3; Pl. 56.1 Resp. ¶ 3.) Denise testified in her deposition that Andre could read lips when the speaker faced him and enunciated clearly, and it is undisputed that the members of his family did not communicate with him through ASL. (Def. 56.1 ¶¶ 5, 7; Pl. 56.1 Resp. ¶¶ 5, 7.)

Throughout 2012 and 2013, Andre received medical treatment at Lincoln Hospital, and, in October 2013, received treatment at Jacobi Hospital. Both hospitals are located in the Bronx and are part of the HHC system. (Def. 56.1 ¶ 25; Pl. 56.1 Resp. ¶ 25.) The HHC has contracts with vendors that provide sign-language interpreters, either in person or through vide-remote interpretation ("VRI"). (Def. 56.1 ¶ 30; Pl. 56.1 Resp. ¶ 30.)

Throughout the course of Andre's treatment, doctors and other staff members at Jacobi Hospital and Lincoln Hospital made notations in Andre's medical records about his hearing impairment and communication difficulties, including observations as to the use of an interpreter, the functioning of his hearing aid and his willingness to communicate. As Berry-Mayes notes, staff at Lincoln observed that Andre "has severe hearing impairment, requires monitor with sign language to adequately communicate," and that "communication is extremely difficult" due to his severe hearing impairment. (Pl. 56.1 ¶¶ 16-22; Def. 56.1 Resp. ¶¶ 16-22.) In October 2013, when Andre was receiving treatment at Jacobi Hospital, employees made similar notations, observing, among other things, that Andre "usually needs sign language help," had a "difficulty/inability to speak" and "inability to communicate." (Pl. 56.1 ¶¶ 23-28; Def. 56.1 Resp. ¶¶ 23-28.)

Berry-Mayes relies heavily on the absence of an interpreter's signature on various forms as evidence that Andre was not provided with adequate access to an interpreter. As will be discussed below, the HHC has come forward with evidence that it frequently provided a sign language interpreter to Andre, particularly with regard to interactions before and after surgeries. There is no evidence that Andre ever requested an interpreter, and, on occasion, hospital staff arranged for an interpreter even though Andre requested that one not be used. (Def. 56.1 ¶¶ 501, 506-07; Pl. 56.1 Resp. ¶¶ 501, 506-07.)

At Lincoln Hospital, Andre signed twenty consent forms related to his treatment. (Pl. 56.1 ¶¶ 59-60; Def. 56.1 Resp. ¶¶ 59-60.) Eight of the consent forms were signed by both Andre and a sign-language interpreter, but twelve were signed by Andre without the additional signature of an interpreter. (Id.) Andre signed ten additional forms at Lincoln relating to his discharge and care plans, none of which included an interpreter's signature. (Pl. 56.1 ¶¶ 70-79; Def. 56.1 Resp. ¶¶ 70-79.) At Jacobi Hospital, Andre signed seven consent forms, one that included the signature of an interpreter and six that did not. (Pl. 56.1 ¶¶ 61-69; Def. 56.1 Resp. ¶¶ 61-69.)

SUMMARY JUDGMENT STANDARD.

Summary judgment "shall" be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a), Fed. R. Civ. P. A fact is material if it "might affect the outcome of the suit under the governing law...." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). On a motion for summary judgment, the court must "construe the facts in the light most favorable to the non-moving party and resolve all ambiguities and draw all reasonable inferences against the movant." Delaney v. Bank of Am. Corp., 766 F.3d 163, 167 (2d Cir. 2014) (quotation marks omitted). It is the initial burden of the movant to come forward with evidence on each material element of his claim or defense, demonstrating entitlement to relief, and the evidence on each material element must be sufficient to entitle the movant to relief in its favor as a matter of law. Vt. Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004).

***3** If the moving party meets its burden, "the nonmoving party must come forward with admissible evidence sufficient to raise a genuine issue of fact for trial in order to avoid summary judgment." Jaramillo v. Weyerhaeuser Co., 536 F.3d 140, 145 (2d Cir. 2008). "A dispute regarding a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Anderson, 477 U.S. at 248). "A party opposing summary judgment does not show the existence of a genuine issue of fact to be tried merely by making assertions that are conclusory or based on speculation." Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 310 (2d Cir. 2008) (internal citations omitted). An opposing party's facts "must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, nor merely suspicions." Contemporary Mission, Inc. v. U.S. Postal Serv., 648 F.2d 97, 107 n.14 (2d Cir. 1981) (quotation marks omitted).

Local Civil Rule 56.1(a) requires a summary judgment movant to annex a "short and concise statement, in numbered

paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." In support of its motion, the HHC has filed a 583-paragraph Rule 56.1 Statement that is 102 pages in length. (Docket # 38.) It recounts in detail Andre Berry's interactions with hospital staff and the nature of his communications during these interactions. Plaintiff Berry-Mayes disputes many of the facts asserted by the HHC. Certain of her statements in opposition, including those going to the strength of Andre Berry's communications abilities, are specific and point to conflicting evidence in the record, but many others are conclusory, speculative or go to the weight to be afforded certain statements. In granting the HHC's motion, the Court construes the facts in the light most favorable to Berry-Mayes and resolves all ambiguities in her favor. See Delaney, 766 F.3d at 167. However, to the extent that Berry-Mayes has made conclusory or speculative statements in opposition, those statements do not raise factual disputes that would permit a reasonable jury to find in her favor. See Major League Baseball Properties, 542 F.3d at 310.

DISCUSSION.

I. Overview of the Rehabilitation Act and the ADA.

The Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...." 29 U.S.C. § 794(a). Justice Department regulations require that recipients of federal funding "shall insure that communications with their ... beneficiaries are effectively conveyed to those having impaired ... hearing." 28 C.F.R. § 42.503(e). "A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care." 45 C.F.R. § 84.52(c). A hospital also "shall provide appropriate auxiliary aids" to persons with impaired sensory or speaking skills, which "may include ... interpreters, and other aids for persons with impaired hearing." 45 C.F.R. § 84.52(d)(1), (3). "Thus the RA does not ensure equal medical treatment, but does require equal access to and equal participation in a patient's own treatment." Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 275 (2d Cir. 2009).

Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. DOJ regulations require that "[a] public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others." 28 C.F.R. § 35.160(a)(1). They further state that "[a] public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities ... an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity." Id. § 35.160(b)(1). Auxiliary aids are defined to include "[q]ualified interpreters on-site or through video remote interpreting (VRI) services ... written materials; exchange of written notes; ... voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing." 28 C.F.R. § 35.104(1).

***4** The ADA regulations further provide that the type of auxiliary aid "will vary" depending upon the circumstances and the request of the individual with a disability:

> The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities.

28 C.F.R. § 35.160(b)(2).

The Second Circuit has observed that the ADA and the Rehabilitation Act contain near-identical requirements

when claims are brought against local governments. See Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003) ("[a]lthough there are subtle differences between these disability acts, the standards adopted by Title II of the ADA for State and local government services are generally the same as those required under section 504 of federally assisted programs and activities.") (quotation marks omitted); accord Wright v. New York State Dep't of Corr., —— F.3d ——, 2016 WL 4056036, at *4 (2d Cir. July 29, 2016) (treating ADA and Rehabilitation Act claims "identically" "[b]ecause the standards under both statutes are generally the same and the subtle distinctions between the statutes are not implicated in this case....").

The parties have not pointed to any differences in applying the ADA and the Rehabilitation Act to plaintiff's claims. (See, e.g., Pl. Mem. at 4 ("Conveniently, Title II and Section 504 impose essentially the same standards on covered entities....").) The Court therefore considers the ADA and Rehabilitation Act claims together.

To make out a prima facie violation of the ADA and the Rehabilitation Act, a plaintiff must show that he is "(1) a 'handicapped person' as defined in the RA; (2) 'otherwise qualified' to participate in the offered activity or to enjoy its benefits; (3) excluded from such participation or enjoyment solely by reason of his or her handicap; and (4) being denied participation in a program that receives federal financial assistance." Loeffler, 582 F.3d at 275; see also Wright, —— F.3d at ——, 2016 WL 4056036, at *4 (listing same requirements for a prima facie violation of the ADA and Rehabilitation Act). "Once a prima facie violation of section 504 has been established, "the defendant must present evidence to rebut the inference of illegality." Rothschild v. Grottenthaler, 907 F.2d 286, 290 (2d Cir. 1990).

For the purposes of this motion, the HHC does not dispute that, under the federal statutes, Andre was a qualified individual with a disability, or that the HHC is an entity that receives federal funds and is therefore required to comply with the ADA and the Rehabilitation Act. (Def. Mem. at 4 n.2.)

An entity covered by the ADA and the Rehabilitation Act must provide the assistance necessary to permit a disabled individual to participate in the relevant activities. See, e.g., Rothschild, 907 F.2d at 293 (school district required to provide sign-language interpreter for deaf parents attending parent-teacher conferences). The required assistance varies based on the circumstances. Rothschild concluded that a school district must provide sign-language interpreters to deaf parents only for school-initiated conferences that involved academic or disciplinary issues. Id. The district was not, however, required to provide an interpreter for extra-curricular events or the school graduation ceremony. Id. at 292-93. The Second Circuit described this as "an accommodation which fosters the [parents'] interest in their children's educational development by facilitating their involvement in that development, without requiring the School District to subsidize parental involvement in extracurricular activities." Id. at 293.

***5** When providing accommodations under the two statutes, covered entities must "engage in an individualized inquiry" to determine whether an accommodation is reasonable under Title II of the ADA. Wright, —— F.3d at ——, 2016 WL 4056036, at *8. In Wright, which involved an inmate's request to use a motorized wheelchair in a state correctional facility, the Second Circuit concluded that officials improperly relied on a blanket rule against the use of motorized wheelchairs, and did not evaluate the plaintiff's individual circumstances when denying his request for an accommodation. Id. at *8-9.

II. No Reasonable Jury Could Conclude that Andre Berry Was Denied the Accommodations Required by the ADA and Rehabilitation Act.

A. Andre's Difficulties in Communicating.

It is undisputed that Andre was deaf. (Pl. 56.1 ¶¶ 3; Def. 56.1 ¶¶ 3.) He was able to communicate comfortably by using sign language. (Def. 56.1 ¶ 6; Pl. 56.1 Resp. ¶ 6.) He understood English, and told hospital staff that his preferred language was English. (See, e.g., Def. 56.1 ¶¶ 4, 88, 90, 124; Pl. 56.1 Resp. ¶¶ 4, 88, 90, 124.) At times he used a hearing aid, the use of which was documented by hospital staff. (See, e.g., Def. 56.1 ¶¶ 95, 191, 221, 262; Pl. 56.1 Resp. ¶¶ 95, 191, 221, 262.) Denise testified that Andre had the ability to read lips in certain circumstances, and some nurses and doctors who treated Andre noted that he could read lips. (Def. 56.1 ¶¶ 3, 77, 249, 409; Pl. 56.1 Resp. ¶¶ 3, 77, 249, 409.)

The parties disagree about the extent to which Andre was able to communicate by using spoken English. According to the HHC, Andre had "verbal speech capabilities," but Denise testified that he had "ineffective speech capabilities" and "wasn't competent with his speech." (Def. 56.1 ¶ 4; Pl. 56.1

Resp. ¶ 4.) Denise testified that Andre was "[n]ot completely mute, but couldn't communicate effectively, verbally." (Pl. 56.1 Resp. ¶ 4.) In discussing the HHC's summary judgment motion, the Court views the facts in the light most favorable to Berry-Mayes, and assumes for the purposes of this motion that Andre could not communicate effectively by speaking.

B. Andre's Visits to Lincoln Hospital.

Andre visited Lincoln Hospital several times in 2012 and 2013. The HHC has come forward with unrebutted evidence that it provided him with an interpreter during the critical moments of treatment and at nearly all of his visits. The HHC provided an interpreter on his visits to Lincoln Hospital's renal clinic on September 4 and December 18, 2012 (Def. 56.1 ¶¶ 72-73, 81-82, Pl. 56.1 Resp. ¶¶ 72-73, 81-82), a January 10, 2013 visit to its outpatient clinic (Def. 56.1 ¶¶ 122-24; Pl. 56.1 Resp. ¶¶ 122-24), a January 16, 2013 visit where he underwent vascular surgery (Def. 56.1 ¶¶ 128-136; Pl. 56.1 Resp. ¶¶ 128-36) and during a January 24, 2013 visit to the emergency room and his ensuing stay. (Def. 56.1 ¶¶ 141, 154, 182, 226, 228; Pl. 56.1 Resp. ¶¶ 141, 154, 182, 226, 228.) In her deposition, Denise testified that when she visited Andre on January 29, 2013, she requested a Deaf Talk machine for Andre, which the staff provided but then appeared unable to operate. (Def. 56.1 ¶¶ 207-13.) Staff notations made later that morning state that staff was communicating with Andre via a Deaf Talk machine and interpreter. (Def. 56.1 ¶¶ 214, 216; Pl. 56.1 Resp. ¶¶ 214, 216.)

The Court need not recount all of those visits in detail, but in light of the plaintiff's contention that the hospitals failed to assess Andre's needs and provide necessary accommodations, it is worthwhile to review an illustrative example of his treatment at Lincoln, and plaintiff's evidence in opposition. During a January 25, 2013 visit to Lincoln Hospital, a social worker observed that Andre had a communication impediment because he was deaf, noted that his preferred language was English and noted that an interpreter was "required." (Pl. 56.1 ¶ 16; Def. 56.1 Resp. ¶ 16; Def. 56.1 ¶ 179; Pl. 56.1 Resp. ¶ 179.) The hospital provided a sign-language interpreter and the social worker conducted a "comprehensive assessment" of Andre. (Def. 56.1 ¶ 180; Pl. 56.1 Resp. ¶ 180.) The social worker noted that Andre "appears to have insight" about his illness and "appears able to verbalize questions and concerns." (Def. 56.1 ¶ 180; Pl. 56.1 Resp. ¶ 180.) Through the interpreter, the social worker discussed discharge plans with Andre. (Def. 56.1 ¶ 181; Pl. 56.1 Resp. ¶ 181.)

***6** In opposition, plaintiff contends only that the record identifies an interpreter as "Jackie number 9132" who used a Deaf Talk machine, but that the records do not indicate the length of time that the interpreter was used, and that Deaf Talk invoices do not have an entry for an interpreter used on this date. (Pl. 56.1 Resp. ¶ 180.) This is not evidence that an interpreter was not used on that date, however, and is not evidence that the HHC failed to provide Andre with a reasonable accommodation.

At times, notations made by staff at Lincoln Hospital indicate communications that did not involve an interpreter, including observations that Andre was "able to read lips" and use the "deaf computer," "communicates clearly with [his] hearing aid," "obeys verbal commands" and is "easily upset when being talked to"; hospital records indicate that in the hours after the latter notation was made, Andre communicated with staff through an interpreter. (Def. 56.1 ¶¶ 249, 262, 167, 170, 180, 184; Pl. 56.1 Resp. ¶¶ 249, 262, 167, 170, 180, 184.) As discussed, the ADA, the Rehabilitation Act and their implementing regulations do not require that a sign-language interpreter be provided for every interaction with a hearing-impaired patient. In opposition, Berry-Mayes has not explained how these interactions with staff violated Andre's right to equal access to the HHC's services or otherwise short of the accommodations required by federal law or.

Andre made additional visits to Lincoln where there is no documentation concerning the use of an interpreter. On April 10, 2013, he received a pre-scheduled "revision to the left AV fistula" that had been the subject of his January 2013 procedure, and attended a follow-up appointment on April 26. (Def. 56.1 ¶¶ 261-72; Pl. 56.1 Resp. ¶¶ 261-72.) There is no indication that an interpreter was provided, but notes stated that Andre "communicates clearly with [his] hearing aid" and "verbalized adequate understanding regarding pain management." (Id.) In a visit to the emergency department on September 19, 2013, there is no notation indicating that he was provided with a translator, but staff noted that Andre was deaf and used hearing aids; he received emergency dialysis treatment and signed a form titled "Departure Against Medical Advice." (Def. 56.1 ¶¶ 284-99; Pl. 56.1 Resp. ¶¶ 284-99.) Andre arrived to the emergency department on three other dates seeking dialysis treatment, during which staff recorded difficulties in communicating with him, and there is no indication that a translator was provided during these

visits. (Def. 56.1 ¶¶ 273-83, 300-18.) However, as noted in the appendix to the ADA regulations:

> [T]he type of auxiliary aid or service necessary to ensure effective communication will vary with the situation.... Sign language or oral interpreters, for example, may be required when the information being communicated in a transaction with a deaf individual is complex, or is exchanged for a lengthy period of time.... [A]n individual who is deaf or hard of hearing may need a qualified interpreter to communicate with municipal hospital personnel about diagnoses, procedures, tests, treatment options, surgery, or prescribed medication (e.g., dosage, side effects, drug interactions, etc.), or to explain follow-up treatments, therapies, test results, or recovery. In comparison, in a simpler, shorter interaction, the method to achieve effective communication can be more basic.

28 C.F.R. Pt. 35, App. A, Subpart E – Communications. The appendix commentary makes plain that the nature and circumstances of the hospital visit are relevant to determining whether a sign language interpreter is required.

***7** An individual with a chronic renal disease who routinely received dialysis treatment and sought treatment on a walk-in basis may not need a sign-language interpreter, particularly for an individual who can read the written word and has some ability to read lips. Situations that involve surgery, diagnosis or more complex treatment may require an interpreter. Berry-Mayes has cited no evidence that Andre requested an interpreter during these visits or that any such request was denied. She also has cited no evidence that the absence of an interpreter during these visits affected Andre's right to equal access to the HHC or affected his care or treatment options.

C. Andre's Stay at Jacobi Hospital.

Andre's spent eight days at Jacobi Hospital in late October 2013. On October 21, 2013, Andre arrived at the hospital's emergency room and remained at the facility until October 29, when he voluntarily discharged himself against the advice of doctors. (Def. 56.1 ¶¶ 381; Pl. ¶ 381.) A sign-language interpreter was present at Jacobi when he arrived at the hospital on October 21, but it is unclear whether Andre used an interpreter. (Def. 56.1 ¶ 382; Pl. 56.1 ¶ 382.) On the following day, an interpreter was sent to communicate with Andre but was unable to wake him. (Def. 56.1 ¶ 385; Pl. 56.1 Resp. ¶ 385.)

When Denise visited Andre at Jacobi on or about October 23, 2013, she asked a nurse why her brother did not have a Deaf Talk machine by his bed or a sign-language interpreter, and explained that her brother was deaf. (Pl. 56.1 ¶ 34.) In her deposition, Denise testified that a doctor had been unable to explain a surgical procedure to Andre because Andre was deaf, and that the doctor did not know how to use the Deaf Talk machine in Andre's room. (Pl. 56.1 ¶¶ 39-40; Def. 56.1 ¶¶ 39-40.) Hospital records for that date state: "The sister Denise Berry of [unit] 4B patient Andre Berry states that her brother needs a sign language interpreter to communicate with staff on 4B because the sister states that his hearing aid battery is getting low." (Def. 56.1 ¶ 388; Pl. 56.1 Resp. ¶ 388.) The records state: "Sign language interpreter Larry visited the patient on 10/23/13 in the morning to interpret for the nurses. Larry states that the patient told him he is refusing the sign language interpreting services because he is able to communicate with the nurses without the assistance of a sign language interpreter." (Def. 56.1 ¶ 389; Pl. 56.1 Resp. ¶ 389.) The records state that Richard Hill, a patient representative at Jacobi, then contacted a sign language interpreter and arranged for her to interpret for Andre that evening. (Def. 56.1 ¶ 392; Pl. 56.1 Resp. ¶ 392.) The interpreter worked with Andre for approximately three hours, beginning at 5:30 p.m. and continuing through his transfer to a different hospital room. (Def. 56.1 ¶ 392; Pl. 56.1 Resp. ¶ 392.)

Hospital records indicate that the following evening, the same interpreter worked with Andre for slightly less than one hour "in preparation for" his upcoming vascular surgery. (Def. 56.1 ¶¶ 395-96; Pl. 56.1 Resp. ¶ 395-96.) He communicated through a different interpreter earlier that day. (Def. 56.1 ¶ 393; Pl. 56.1 Resp. ¶ 393.) Andre had vascular surgery on October 25, 2013. (Def. 56.1 ¶ 397; Pl. 56.1 Resp. ¶ 397.) Interpreter invoices reflect that an interpreter provided services for Andre on October 26, 27 and 28. (Def. 56.1 ¶¶ 399-400, 402.) The plaintiff cites to written assessments from

hospital staff for that same period, which noted difficulties in communicating with Andre and his use of a malfunctioning hearing aid. (Pl. 56.1 ¶¶ 23-26; Def. 56.1 ¶¶ 23-26.)

***8** On October 29, 2013, doctors observed that Andre had ongoing vascular problems due to clotting. (Def. 56.1 ¶¶ 503-04; Pl. 56.1 Resp. ¶¶ 503-04.) One doctor noted that Andre was "frustrated" and "asking to leave today" because he "has bills that he has to pay." (Def. 56.1 ¶ 505; Pl. 56.1 Resp. ¶ 505.) The doctor explained the risks of leaving against medical advice and that an additional procedure was planned for the following day. (Def. 56.1 ¶ 505; Pl. 56.1 Resp. ¶ 505.) About a half-hour later, Andre spoke to a social worker who offered to get him an interpreter, but Andre declined and stated that he would read her lips. (Def. 56.1 ¶ 506; Pl. 56.1 Resp. ¶ 506.) Andre stated that he needed to leave the hospital to pay his bills and retrieve hearing-aid batteries, but that doctors told him he could not leave or go alone. (Def. 56.1 ¶ 506; Pl. 56.1 Resp. ¶ 506.) The social worker returned with a sign language interpreter and explained that Andre could sign himself out, but would have to wait for doctors to remove his tubes, and that he must return to Jacobi or visit another hospital. (Def. 56.1 ¶ 507; Pl. 56.1 Resp. ¶ 507.) A doctor's notation recounted a conversation with Andre that occurred through an interpreter and in the presence of a social worker in which the doctor strongly urged him against leaving the hospital and explained that a procedure was scheduled for the next day. (Def. 56.1 ¶ 511; Pl. 56.1 ¶ 511.) Andre was discharged at approximately 3:30 p.m. on October 29. (Def. 56.1 ¶ 510; Pl. 56.1 Resp. ¶ 510.)

The HHC has come forward with evidence that throughout Andre's stay at Jacobi, he was provided with the reasonable accommodations required by the ADA and the Rehabilitation Act. An interpreter was provided for Andre during all major discussions of his condition, including those related to his surgery and his discharge. HHC staff provided a translator when Andre did not specifically request one, and, prior to his discharge, after Andre expressly declined translator services. Hospital staff thoroughly documented Andre's communication needs, including the functioning of his hearing aid and his ability to read lips. In opposition, Berry-Mayes frequently objects to the materiality or relevance of the HHC's evidence, but has failed to identify any instance where Jacobi staff failed to provide an accommodation to Andre.

D. Andre's Post-Discharge Visit to Lincoln and Subsequent Death.

Following his discharge from Jacobi, Andre arrived at Denise's home, and she advised him to return to the hospital. (Def. 56.1 ¶¶ 512-13; Pl. 56.1 ¶¶ 512-13.) Denise then called 911, and an ambulance was dispatched to transport Andre to Lincoln. (Def. 56.1 ¶¶ 515-17; Pl. 56.1 ¶¶ 515-17.) EMS noted that Andre's chief complaint involved pain in the region of his dialysis shunt and that he was transported to Lincoln without incident. (Def. 56.1 ¶¶ 520-22; Pl. 56.1 ¶¶ 520-22.)

At Lincoln, a nurse observed that Andre was "hearing impaired" and "speech impaired" and recorded pain and swelling in the region around his dialysis shunt. (Def. 56.1 ¶ 523; Pl. 56.1 Resp. ¶ 523.) Andre signed a "General Consent to Treatment," and the form was not signed by a sign-language interpreter. (Def. 56.1 ¶ 524; Pl. 56.1 Resp. ¶ 524.) A nurse and a doctor examined Andre and assessed his history, changed the dressing on his wound site and deemed him stable for discharge. (Def. 56.1 ¶¶ 525-34; Pl. 56.1 ¶¶ 525-35.) He was provided with a "Follow-Up" form instructing him to visit his primary care provider in one week. (Def. 56.1 ¶ 535; Pl. 56.1 Resp. ¶ 535.) Andre was discharged from Lincoln at 12:43 a.m. on October 30. (Def. 56.1 ¶ 540; Pl. 56.1 Resp. ¶ 540.)

In declarations, the nurse and doctor state that Andre did not request a sign-language interpreter, and that if he had requested one, an interpreter would have been provided; in opposition, Berry-Mayes contends that their statements are "irrelevant" and "immaterial." (Def. 56.1 ¶¶ 541-42; Pl. 56.1 Resp. ¶¶ 541-42.) The nurse and doctor also state that if they believed Andre had not understood them, they would have taken additional steps to accommodate him; Berry-Mayes opposes these statements as "speculative" and containing "improper pronouns." (Def. 56.1 ¶ 544; Pl. 56.1 Resp. ¶ 544.)

After being discharged from Lincoln, Andre did not return to Denise's home, Jacobi or his primary-care physician. (Def. 56.1 ¶¶ 558-59; Pl. 56.1 Resp. ¶¶ 558-59.) A doctor at Jacobi called Denise the following day to seek out information about Andre's status and whereabouts. (Def. 56.1 ¶ 561; Pl. 56.1 Resp. ¶ 561.) They discussed the difficulty of reaching Andre at his home, and Denise testified in her deposition that she "probably" tried to contact Andre thereafter. (Def. 56.1 ¶¶ 561-62; Pl. 56.1 Resp. ¶¶ 561-62.) Andre was found dead in

his apartment on November 5. (Def. 56.1 ¶ 563; Pl. 56.1 Resp. ¶ 563.)

***9** Andre was not provided an interpreter at this final visit to Lincoln, but the nurse and doctor who treated him state that he did not request one and that they believed they were able to communicate with him effectively. Their treatment consisted of dressing Andre's wound site, which "appeared clean," and the nurse's notes state that Andre denied having serious symptoms such as fever, chills, chest pain or shortness of breath. (Def. 56.1 ¶ 529; Pl. 56.1 Resp. ¶ 529.) When asked, Andre denied that he was experiencing any pain. (Def. 56.1 ¶ 532; Pl. 56.1 Resp. ¶ 532.) Their interaction with Andre was of a relatively limited nature and did not involve the more complicated interaction that could require the use of an interpreter. Berry-Mayes has not explained why an interpreter should have been made available during this visit, and has not come forward with evidence in opposition that supports a violation of the ADA or the Rehabilitation Act.

E. In Opposition, Berry-Mayes Has Not Come Forward with Evidence that Would Permit a Reasonable Jury to Find in Her Favor.

Berry-Mayes often asserts that the hospital's records about the use of an interpreter are insufficient to "establish" that an interpreter was actually used, but she does not explain why. (See, e.g., Pl. 56.1 Resp. ¶¶ 399, 401.) In one instance, she asserts that the interpreter's signature "looks nothing like her signature on any of the Time Sheet records." (Pl. 56.1 Resp. ¶ 396.) Elsewhere, she disputes the HHC's statements concerning the use of an interpreter because the doctor's notation does not identify the interpreter by name or explain the interpreter's qualifications. (Pl. 56.1 Resp. ¶ 106.) Berry-Mayes's statements in opposition "are conclusory or based on speculation," and do not defeat the HHC's motion for summary judgment. Major League Baseball, 542 F.3d at 310.

Berry-Mayes has not identified a single instance where the HHC failed to offer or provide a reasonable accommodation to Andre. In support of her own motion, she relies primarily on the fact that some consent forms include the signature of both Andre and an interpreter, whereas other consent forms contain only Andre's signature. (Pl. 56.1 ¶¶ 47-79.) This is not evidence that the HHC failed to provide a reasonable accommodation. Berry-Mayes does not contend that Andre was impaired in his ability to understand written English or that an interpreter was required in order for him to understand the forms. The absence of an interpreter's signature on the forms also does not support the inference that the HHC did not supply an interpreter to explain or discuss the underlying procedures. For example, the HHC has submitted documentation reflecting that it repeatedly provided interpreter services to Andre in the days before and after his surgery of October 25, 2013. (See Def. 56.1 ¶¶ 395-402.) Plaintiff notes that six consent forms from Jacobi Hospital for this same period do not include an interpreter's signature. (Pl. 56.1 ¶¶ 61-67; Def. 56.1 Resp. ¶¶ 61-67.) Given that the hospital staff had documented Andre's communications difficulties (Pl. 56.1 ¶¶ 23-27; Def. 56.1 Resp. ¶¶ 23-27), provided him an interpreter for portions of each day preceding and following the surgery (Def. 56.1 ¶¶ 395-402; Pl. 56.1 Resp. ¶¶ 395-402), and that there is no contention that Andre was unable to read English, the absence of an interpreter's signature on the consent forms does not support the conclusion that he was denied the accommodations necessary to understand and communicate about his care and treatment decisions. Again, reasonable accommodations must be tailored to each individual's needs and circumstances. See, e.g., Wright, —— F.3d at ——, 2016 WL 4056036, at *8-9; Rothschild, 907 F.2d at 293.

It is consistent with the ADA and the Rehabilitation Act for a hospital to provide an interpreter only in particular situations during a patient's hospitalization. Martin v. Halifax Health Care Systems, Inc., 621 Fed. Appx. 594 (11th Cir. 2015) (summary order), affirmed a district court decision granting summary judgment to the defendant hospital in a case brought under the ADA and the Rehabilitation Act by three plaintiffs. One of the plaintiffs requested an interpreter immediately upon arrival to the hospital, but staff cancelled the request when it was determined that he required emergency cardiac catheterization. Id. at 596. During the procedure, he communicated with doctors and staff using written notes, gestures and lip-reading. Id. at 596-97. In his deposition, the plaintiff testified that throughout his five-day hospitalization, he requested a live sign-language interpreter and that for the majority of the time, no such interpreter was available. Id. at 597. Staff mainly communicated with him through friends and family, written notes and gestures. Id. at 597-98. In affirming the grant of summary judgment, Eleventh Circuit concluded that the hospital used "appropriate auxiliary aids" to communicate with the patient, including written notes, and that he was also provided with eight hours of live sign-language interpreting services. Id. at 602. It noted that the record did not show a failure on the part of the hospital

to ensure effective communications and concluded that no reasonable jury could find for the plaintiff. Id. at 603.

***10** A second plaintiff was the deaf mother of a patient at the same hospital, who requested a live interpreter while her seventeen-year-old daughter went into labor. Id. at 598. The plaintiff was provided with an interpreter for about five hours total during the patient's four-day stay. Id. at 598. For the remainder of the time, staff communicated through the plaintiff through her daughter and via written notes. Id. The Eleventh Circuit concluded that the plaintiff was provided and offered appropriate auxiliary aids, and that she was able to communicate with staff to an extent that no reasonable jury could find for the plaintiff. Id. at 603.

A third patient was not provided with a live interpreter during a two-hour emergency room visit, and communicated with hospital staff through written notes. Id. at 598-99. There was no evidence in the record that the patient requested a live interpreter or that there were communications difficulties between the patient and staff. Id. at 603. The Eleventh Circuit concluded that no reasonable jury could find for the plaintiff. Id.

As was the case with the hospital in Martin, Lincoln Hospital and Jacobi Hospital sometimes provided Andre with an interpreter but also communicated with him using other means. However, in this case, unlike Martin, there is no evidence that the hospital ever denied Andre, or anyone acting upon his behalf, an interpreter when one was requested. Because Berry-Mayes has not come forward with evidence that the HHC denied Andre a reasonable accommodation, the HHC's summary judgment motion is granted.

III. The Record Does Not Support a Declaratory Judgment or Compensatory Damages.

A. Plaintiff Has Not Identified Any "Useful Purpose" to Issuing a Declaratory Judgment.

Berry-Mayes seeks, pursuant to Rule 57, Fed. R. Civ. P., and 28 U.S.C. § 2201, a declaratory judgment stating that the HHC subjected Andre to unlawful discrimination. (Pl. Mem. 27-28; Compl't ¶ 75 (seeking declaratory judgment that the HHC's "practices, policies and procedures subjected Andre Berry to discrimination....").) The Declaratory Judgment Act states:

> In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a). "The Act does not require the courts to issue a declaratory judgment. Rather, it 'confers a discretion on the courts rather than an absolute right upon the litigant.' " The New York Times Co. v. Gonzales, 459 F.3d 160, 165 (2d Cir. 2006) (quoting Wilton v. Seven Falls Co., 515 U.S. 277, 287 (1995)). "[T]he fundamental purpose of the DJA is to 'avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage has accrued' ...." United States v. Doherty, 786 F.2d 491, 498 (2d Cir. 1986) (quoting Luckenbach Steamship Co. v. United States, 312 F.2d 545, 548 (2d Cir. 1963)).

A court should weigh five factors in determining whether declaratory judgment is appropriate:

> (i) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; (ii) whether a judgment would finalize the controversy and offer relief from uncertainty; (iii) whether the proposed remedy is being used merely for 'procedural fencing' or a 'race to res judicata'; (iv) whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and (v) whether there is a better or more effective remedy.

***11** New York Times, 459 F.3d at 167 (quotation marks omitted).

Berry-Mayes has not identified a "useful purpose" for issuing a declaratory judgment or explained how it would finalize the controversy or offer relief from uncertainty. She argues only that if she prevails at trial, "declaratory relief would be appropriate to clarify the legal issues involved and to finalize the controversy." (Pl. Mem. at 28.) However, she offers no explanation as to why this would be the case. Her claims are directed to events that occurred more than a year prior to the commencement of this action during the lifetime of the now-deceased Andre, and do not implicate the "accrual of avoidable damages" or a need for "early adjudication." Doherty, 786 F.2d at 498.

Because Berry-Mayes has not raised any argument or identified any facts as to why declaratory judgment is appropriate, the HHC's summary judgment motion is granted as to declaratory relief.

B. There Is No Evidence of Deliberate Indifference Entitling Plaintiff to Compensatory Damages under the Rehabilitation Act.

In order for a plaintiff to receive compensatory damages under the ADA or the Rehabilitation Act, a plaintiff must prove that the defendant showed "deliberate indifference" to the "strong likelihood" that its actions were unlawful under the federal statutes. Loeffler, 582 F.3d at 275. A claim for money damages may "survive a plaintiff's death." Gershanow v. Cnty. of Rockland, 2014 WL 1099821, at *4 (S.D.N.Y. Mar. 20, 2014).

"Deliberate indifference" does not require evidence of "personal animosity or ill will." Loeffler, 582 F.3d at 275. A plaintiff must show that a person in a position of responsibility could have instituted corrective measures on behalf of the person discriminated against but failed to do so. Id. at 276. In Loeffler, the Second Circuit concluded that a plaintiff offered evidence of deliberate indifference based on official decisions not to pursue multiple, ongoing requests for a sign-language interpreter or other auxiliary aids to a deaf patient who was undergoing surgery. Id. Loeffler suggested, but did not explicitly hold, that deliberate indifference "must be a 'deliberate choice, rather than negligence or bureaucratic inaction.' " Id. (quoting Reynolds v. Giuliani, 506 F.3d 183, 193 (2d Cir. 2007)).

Assuming that there was some evidence that the HHC had denied a reasonable accommodation to Andre, Berry-Mayes has not come forward with evidence that the HHC was deliberately indifferent to its obligations under the ADA and the Rehabilitation Act. As discussed, the HHC had sign language interpreters assigned to both Lincoln and Jacobi, and when interpreters were not already present for the hospital, they were brought in as needed. As also has been discussed, hospital staff thoroughly recorded Andre's communications abilities. When Denise requested an interpreter, one was provided about 90 minutes later. There is no evidence that Andre ever requested an interpreter, and on at least one occasion, the staff utilized a translator even though Andre indicated that he preferred to proceed without one.

***12** Further, a written notice titled "We Provide Free Interpretation Services" was posted in Lincoln's common areas, informing patients that free sign-language interpretation was available. (Def. 56.1 ¶ 42; Pl. 56.1 Resp. ¶ 42.) Jacobi mounted similar posters in its elevator banks, waiting rooms and patient units. (Def. 56.1 ¶ 348; Pl. 56.1 Resp. ¶ 348.) The HHC provided patients with a Patient Handbook that explained that facilities employed patient representatives that could help arrange for interpretation services. (Def. 56.1 ¶ 346; Pl. 56.1 Resp. ¶ 346.)

The HHC has come forward with evidence that it had policies to ensure that hearing-impaired patients had access to an interpreter, and that patients were aware of their right to an interpreter. Berry-Mayes has not directed the Court to evidence that any individual with knowledge of Andre's disabilities failed to act on his behalf, and thus no reasonable jury could conclude that the HHC was deliberately indifferent to its obligations under the ADA and Rehabilitation Act. The HHC's motion for summary judgment is therefore granted as to plaintiff's claim for compensatory damages.

IV. The Court Declines to Exercise Supplemental Jurisdiction over Plaintiff's Claims under the NYSHRL and the NYCHRL.

A district court "may decline to exercise supplemental jurisdiction over" a state-law claim if, as here, "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Its discretion to exercise supplemental jurisdiction in such a situation, however, "is not boundless." Valencia ex rel. Franco v. Lee, 316 F.3d 299, 305

(2d Cir. 2003). "In deciding whether to exercise jurisdiction over supplemental state-law claims, district courts should balance the values of judicial economy, convenience, fairness, and comity—the 'Cohill factors.' " Klein & Co. Futures, Inc. v. Bd. of Trade, 464 F.3d 255, 262 (2d Cir. 2006) (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988)). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors will point toward declining to exercise jurisdiction over the remaining state-law claims." Kolari v. New York-Presbyterian Hosp., 455 F.3d 118, 122 (2d Cir. 2006) (quoting Cohill, 484 U.S. at 350 n. 7 (ellipsis omitted)).

This is such a case. Moreover, this case does not implicate preemption issues and is not ready for trial, unlike actions in which the Second Circuit deemed it proper for the district court to retain supplemental jurisdiction after federal claims were dismissed. See Valencia, 316 F.3d at 306 (collecting cases). Accordingly, the Court declines to exercise supplemental jurisdiction over plaintiff's claims under the NYSHRL and the NYCHRL.

CONCLUSION.

The plaintiff's motion for partial summary judgment is DENIED and the defendant's summary judgment motion is GRANTED. The Clerk is directed to terminate the motions. (Docket # 31, 43.) The Clerk is directed to close the case and to enter judgment in favor of the defendant as to Count One and Count Two and to dismiss Counts Three and Four without prejudice.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 8461191

Footnotes

1 Berry-Mayes states that she "is not seeking damages for wrongful death, or for conscious pain and suffering, or for physical injury," and is only seeking damages relating to acts of alleged discrimination on the part of the HHC. (Pl. Mem. at 26.) As context, the circumstances concerning Andre's death are discussed in this Memorandum and Order, but they are not a part of plaintiff's claims or related to any relief sought.

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Only the Westlaw citation is currently available.
United States District Court, E.D. New York.

Fanni GOLDMAN, Plaintiff,
v.
BROOKLYN CENTER FOR PSYCHOTHERAPY, INC., Defendant.

15-CV-2572 (PKC) (LB)
|
Signed 03/19/2018

Attorneys and Law Firms

Juyoun Han, Leah Wiederhorn, Philip Marcel Black, Andrew Rozynski, Eisenberg & Baum LLP, Seth Asher Nadler, ImbesiLaw, P.C., New York, NY, for Plaintiff.

Kurt E. Bratten, Meredith Haver Savitt, O'Connell and Aronowitz, Albany, NY, for Defendant.

MEMORANDUM & ORDER

PAMELA K. CHEN, United States District Judge

***1** Plaintiff Fanni Goldman ("Plaintiff" or "Goldman") brings this matter alleging that Defendant Brooklyn Center for Psychotherapy ("Defendant" or "BCP") discriminated against her and failed to accommodate her needs as a disabled person in violation of Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 *et seq.* and its implementing regulation, 28 C.F.R. Part 36; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. L. § 290 *et. seq.*; and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-101 *et. seq.* Before the Court are the parties' cross-motions for summary judgment. For the reasons set forth herein, the Court finds that there is a genuine issue of material fact as to whether Defendant discriminated against Plaintiff because of her claimed disability. Accordingly, Defendant's motion for summary judgment is denied, and Plaintiff's cross-motion for partial summary judgment as to liability is also denied.

BACKGROUND

I. Relevant Facts

Plaintiff Fanni Goldman lives in Sheepshead Bay, Brooklyn. (Def. 56.1, Dkt. 47-2, at ¶ 1.)[1] Plaintiff has some ability to hear, but has difficulty doing so.[2] (Deposition of Fanni Goldman ("Goldman Dep."), Dkt. 50-4, at 20:5-17.) Plaintiff testified in her deposition that her speech consists of "broken sentences" containing "some words and some sentences" and that her ability to communicate through speech depends on the circumstances. (*Id.* at 30:4-13; 33:2-3.) She can "sometimes[,] but not 100 percent", hear and understand speech, and only from people she knows. (*Id.* at 20:5-17.) She cannot hear well enough to understand words or the speech of a stranger. (*Id.*) Plaintiff's Linked-In Account states that she is a teacher's assistant at St. Francis de Sales School for the Deaf. (Def. 56.1, at ¶ 15.)

Plaintiff communicates by email and texting; she can type and uses a computer at work. (*Id.* at ¶ 17-19.) Plaintiff communicates by telephone with hearing persons using the Sorenson Relay Service Call.[3] (*Id.* at ¶ 60.) American Sign Language ("ASL") is Plaintiff's "personal preference" for communication. (*Id.* at ¶ 22.) If communicating through ASL is not possible, she will communicate using whatever means is circumstance-appropriate, including speech, lipreading, reading, and writing. (*Id.* at ¶ 23.) Plaintiff communicates with her own medical providers, including her dentist, orthodontist (and the orthodontist's secretary), eye doctor, primary care physician, and obstetrician/gynecologist through handwritten notes, lip-reading, and gestures. (*Id.* at ¶ 29.) Plaintiff communicates with her son, who was born in 2007, through a combination of speaking and signing. (*Id.* at ¶ 27.)

***2** BCP is a non-profit entity that provides moderate-cost mental health services to the Brooklyn community. (*Id.* at ¶ 71.) BCP does not provide emergency mental health services or individual therapy for children, but it does offer play therapy to children for children aged five through nine. (*Id.* at ¶¶ 73-74.) BCP staff are trained that mental health services must be provided in a non-discriminatory manner, and they are given policies on non-discrimination. (*Id.* at ¶ 83.) BCP has an intake process, which involves determining whether the individual's mental health needs are appropriate for BCP to handle and whether there is availability with therapists in a particular specialty. (*Id.* at ¶ 93.)

Plaintiff called BCP on November 11, 2014. (*Id.* at ¶ 106.) Plaintiff was seeking behavioral therapy services for her son. (Goldman Dep., at 180:9-16.) At that time, Plaintiff's son

was refusing to go to school, and Plaintiff feared that her son would run away from home. (Def. 56.1, at ¶ 108.) A BCP receptionist told Plaintiff that she should speak to Rissi Prescott, the intake coordinator. (*Id.* at ¶¶ 110-114.) Plaintiff instead asked to speak to Raquel Arroyo, BCP's director of clinical services. (*Id.* at ¶ 116.) Plaintiff spoke to Ms. Arroyo for 40-45 minutes on the phone that day and told Ms. Arroyo that her son "needed services right away." (*Id.* at ¶¶ 121-22.) Ms. Arroyo told Plaintiff that BCP did not have child psychologists (*id.* at ¶ 123), and that it did not have any "hours" available to treat Plaintiff's son. (Goldman Dep., at 300:5-20; Deposition of Raquel Arroyo ("Arroyo Dep."), Dkt. 47-15, at 40:18-41:10.) Ms. Arroyo testified at her deposition that, as of November 11, 2014, BCP had a wait list for services for children that were Plaintiff's son's age. (Arroyo Dep., at 40:18-41:10, 48:23-49:12.) Plaintiff testified that Ms. Arroyo also told her that BCP did not have interpreter services for hearing-impaired individuals in place at that time. (Goldman Dep., at 197:7-18.) Ms. Arroyo's notes of the call similarly indicate that she told Plaintiff "that an important part of treatment requires ongoing involvement of the parent and [that BCP] did not have interpreter services in place at that time." (Arroyo Call Summary, Dkt. 50-4, at 493.) Ms. Arroyo referred Plaintiff to other medical service providers, including Coney Island Hospital and Advocates for the Blind. (*Id.*; Def. 56.1, at ¶ 128.)

Plaintiff called BCP again on December 15, 2014. (*Id.* at ¶ 132.) The December call was conducted through a Sorenson Relay Service Call. (*Id.* at ¶ 141.) Plaintiff videotaped the call. (Def. 56.1, at ¶ 133.) During the December 15 call, Plaintiff initially spoke with Halinda, BCP's receptionist. (*Id.* at ¶ 142.) Plaintiff told Halinda that she was calling to make an appointment for her son and that he needed to see a psychologist "as soon as possible." (*Id.* at ¶ 143.) Plaintiff eventually asked to speak to Ms. Arroyo. (*Id.* at ¶ 145.) When Ms. Arroyo got on the phone, she reminded Plaintiff of their earlier conversation, in which she had told Plaintiff that the facility did not have any available hours for her son. (Tr. of Sorenson Call on 12/15/2014 ("Sorenson Call Tr."), Dkt. 47-28, at 3.) In response to questioning by Plaintiff, Ms. Arroyo again said that the facility did not have interpreter services in place at that time. (*Id.* at 3, 5.) Ms. Arroyo again referred Plaintiff to Coney Island Hospital and offered to call the facility for her. (*Id.* at 3.)

When Plaintiff contacted Ms. Arroyo on December 15, 2014, she had already wanted to file a lawsuit against BCP for discrimination. (Goldman Dep., at 287:17-21.) Plaintiff was so upset after her first conversation with Ms. Arroyo that she decided to order recording equipment to videotape the second conversation. (Def. 56.1, ¶ 134.) Plaintiff did not inform Ms. Arroyo that she was recording the call. (*Id.* at ¶ 138.) Plaintiff did not contact anyone at BCP other than Ms. Arroyo and did not pursue the patient complaint process at BCP. (*Id.* at ¶ 164.) Plaintiff did not contact Ms. Arroyo after December 15, 2014. (*Id.* at ¶ 151.)

***3** On May 29, 2015, BCP entered into a contract with Sign Talk to provide ASL interpreting services to BCP. (*Id.* at ¶ 104.)

II. Procedural History

Plaintiff filed her complaint in this action on May 5, 2015. (Dkt. 1.) The parties completed discovery on August 3, 2016. Defendant moved for summary judgment on March 8, 2017. (Dkt. 47.) Plaintiff filed a cross-motion for partial summary judgment on the issue of liability on March 9, 2017. (Dkt. 50.) At Plaintiff's request, the Court held oral argument on the parties' cross-motions on March 15, 2018. (Dkt. 53.)

STANDARD OF REVIEW

"Summary judgment is appropriate where there are no genuine disputes concerning any material facts, and where the moving party is entitled to judgment as a matter of law." *Summa v. Hofstra Univ.*, 708 F.3d 115, 123 (2d Cir. 2013) (quoting *Weinstein v. Albright*, 261 F.3d 127, 132 (2d Cir. 2001)); *see also* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "Material" facts are facts that "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. A "genuine" dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "The moving party bears the burden of establishing the absence of any genuine issue of material fact." *Zalaski v. City of Bridgeport Police Dep't*, 613 F.3d 336, 340 (2d Cir. 2010) (citing *Celotex Corp.*, 477 U.S. at 322). Once a defendant has met his initial burden, the plaintiff must "designate specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324 (internal quotation marks omitted). In determining whether there are genuine disputes of material fact, the court must "resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003)

(citation and internal quotation marks omitted). "Summary judgment is appropriate only '[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.' " *Donnelly v. Greenburgh Cent. Sch. Dist. No. 7*, 691 F.3d 134, 141 (2d Cir. 2012) (alterations in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

The same standard of review applies when the Court is faced with cross-motions for summary judgment, as here. *See Lauria v. Heffernan*, 607 F. Supp. 2d 403, 407 (E.D.N.Y. 2009) (internal citations omitted). When evaluating cross-motions for summary judgment, the Court reviews each party's motion on its own merits, and draws all reasonable inferences against the party whose motion is under consideration. *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001). The Court addresses each of the party's motions in turn.

DISCUSSION

I. Legal Standards of the ADA and the Rehabilitation Act

The ADA and the Rehabilitation Act (collectively, the "Acts") "prohibit discrimination against qualified disabled individuals by requiring that they receive reasonable accommodations that permit them to have access to and take a meaningful part in public services and public accommodations." *Powell v. National Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir. 2004) (citations and quotation marks omitted). Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns ... or operates a place of public accommodation." 42 U.S.C. § 12182(a). The ADA defines discrimination to include the "failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden." 42 U.S.C. § 12182(b)(2)(A)(iii). Services that may be required by the ADA include: "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments." 42 U.S.C. § 12103(1)(A). Title III of the ADA *only* allows for injunctive relief, not damages. *Powell*, 364 F.3d at 86.

***4** The Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Section 504 of the Rehabilitation Act, enacted prior to the ADA, is narrower than the ADA in that its provisions apply only to programs receiving federal financial assistance. 29 U.S.C. § 794(a). The Rehabilitation Act allows for the recovery of damages, provided that the plaintiff shows that the statutory violation resulted from "deliberate indifference" to the rights secured by the Rehabilitation Act. *Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn*, 280 F.3d 98, 115 (2d Cir. 2001). Because the standards adopted by [Title III] are, in most cases, "the same as those required under the Rehabilitation Act," the Court considers these claims together. *Powell*, 364 F.3d at 85 (citation omitted).

Title III and Rehabilitation Act claims include claims based on intentional discrimination, *i.e.*, disparate treatment, disparate impact, and the failure to make a reasonable accommodation. *Doe v. Pfrommer*, 148 F.3d 73, 82 (2d Cir. 1998). To establish a *prima facie* case under either statute for failure to make a reasonable accommodation, a plaintiff must demonstrate: "(1) that [plaintiff] is a qualified individual with a disability; (2) that the [defendant is] subject to one of the Acts; and (3) that [plaintiff] 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 his or her disability." *Powell*, 364 F.3d at 85. In light of the broad statutory definition of discrimination, defendants have a presumptive obligation to provide "reasonable accommodations" to individuals with disabilities. Consequently, a covered entity's failure to provide such accommodations will be sufficient to satisfy the third element. *See* 42 U.S.C. § 12182(b)(2)(a)(ii); *Powell*, 364 F.3d at 85. The question of whether a proposed accommodation is reasonable is fact-specific and must be evaluated on a case-by-case basis. *Kennedy v. Dresser Rand Co.*, 193 F.3d 120, 122 (2d Cir. 1999).

II. Defendant's Motion for Summary Judgment

A. Plaintiff's Disability under the Acts

Plaintiff's discrimination claim is based on a reasonable accommodation theory. Plaintiff claims that she is deaf. (Pl. Response to Def. 56.1, Dkt. 51-1, at ¶ 4.) BCP claims she is not. (Def. 56.1, at ¶ 4.) Defendant does not dispute that Plaintiff suffers from an "impairment," but argues that "Plaintiff is not deaf; she testified, 'I don't hear very well' and that she has some ability to hear." (Def. Mot., Dkt. 47-1, at 9.) For purposes of this case, the definition of "disability" is taken from the ADA, which defines "disability" as "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102.

Plaintiff testified—and Defendant does not dispute—that her ability to hear is limited such that she is generally unable to understand words or speech, and is unable to communicate effectively through speech. (Pl. Response to Def. 56.1, at ¶¶ 3-8.) Plaintiff claims that she is substantially limited in the major life activities of hearing and speaking, and therefore is an individual with a disability within the meaning of the ADA. 42 U.S.C. § 12102. Based on this record, as well as the statutory mandate to interpret the definition of "disability" broadly, and construing the record in the light most favorable to Plaintiff, the Court finds that she is disabled for purposes of her claims under the Acts.

Plaintiff further alleges that because she is a disabled individual who was seeking services for her minor son, she qualifies as a "companion" within the meaning of the ADA implementing regulations. 28 C.F.R. § 36.303(c)(1)(i) ("For purposes of this section, 'companion' means a family member, friend, or associate of an individual seeking access to, or participating in, the goods, services, facilities, privileges, advantages, or accommodations of a public accommodation, who, along with such individual, is an appropriate person with whom the public accommodation should communicate."). The Court agrees that, based on the undisputed facts, Plaintiff was a "companion" within the meaning of the ADA regulations. *Id.*

B. Defendant's Status as a "Public Accommodation" under the Acts

***5** BCP is a psychiatric clinic that provides moderately priced medical services to the public in Brooklyn. (Def. 56.1, at ¶ 71; Pl.'s 56.1, Dkt. 50-2, at ¶ 4.) BCP is, therefore, a public accommodation within the meaning of the Acts. 42 U.S.C. § 12181(7)(F). BCP also does not dispute that it receives federal funds (*see* Def. Response to Pl.'s 56.1, at ¶ 6), and is, therefore, subject to the Rehabilitation Act, 29 U.S.C. § 794(b).

C. Defendant's Alleged Discrimination under the Acts

Plaintiff alleges that BCP denied psychiatric services to her son because of her deafness. (Pl. Mot., at 12.) Plaintiff claims that Ms. Arroyo, who is the Director of Clinical Services at BCP, informed Plaintiff that BCP would not provide a sign language interpreter for Plaintiff and that she should look elsewhere for mental health services for her son. (*Id.*) Plaintiff argues that BCP's "preemptive"[4] refusal to provide services based on Plaintiff's disability constitutes a *prima facie* case of discrimination under the Acts. BCP counters that the only reason it denied services to Plaintiff's son was because Plaintiff said that her son needed the services immediately and BCP did not have any openings at that time in its behavioral therapy classes. (Def. Mot., at 5; Def. 56.1, at ¶ 122.) Despite not having any openings, BCP alleges that Ms. Arroyo tried to arrange for alternate accommodations for Plaintiff's son at facilities with openings.

The Court must determine whether there is sufficient evidence for a jury to find that Plaintiff was "denied the opportunity to participate in or benefit from [Defendant's] services, programs, or activities, or was otherwise discriminated against by [Defendant], *by reason of ... her disability*." *Powell*, 364 F.3d at 85 (emphasis added). This Circuit uses a "substantial cause" analysis to determine whether discrimination occurred under the Acts. In *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003), the Second Circuit held that a plaintiff "suing under the ADA or Rehabilitation Act may show that he or she has been excluded from or denied the benefits of a public entity's services or programs by reason of such disability even if there are other contributory causes for the exclusion or denial, as long as ... the disability was a *substantial cause* of the exclusion or denial." *Id.* at 291 (emphasis added); *accord Meekins v. City of New York*, 524 F. Supp. 2d 402, 407 (S.D.N.Y. 2007) ("The Second Circuit has held that, because the ADA is remedial legislation and because remedial legislation should be construed broadly to effectuate its purposes, the causation standard under the ADA requires only that the disability be a substantial cause of the exclusion or denial at issue.") (internal quotation marks omitted).

The parties dispute whether Plaintiff's disability was a "substantial cause" in BCP's denial of mental health services to Plaintiff's son. The Court notes that the entire interaction between Plaintiff and BCP occurred over the course of two telephone conversations, one on November 14, 2014 and the

other on December 15, 2014. The Court considers each of these conversations in turn.

i. The November 11, 2014 Call

***6** On November 11, 2014, Plaintiff called BCP, asking to speak directly with the Director of Clinical Services, Ms. Arroyo. (Def. 56.1, ¶ 116.) While the parties present differing accounts of the call, it is undisputed that Plaintiff advised Ms. Arroyo that her son needed immediate mental health services and that Plaintiff requested a child psychologist for her son. (*Id.* at ¶¶ 122, 143.) Plaintiff testified that Ms. Arroyo "preemptively" informed her that Defendant *would not* provide Plaintiff interpreter services and referred her to other hospitals in Brooklyn. (Goldman Dep., at 199:8-200:2) ("I asked to make an appointment and she said, no, we don't provide sign language interpreters, you might want to contact these other two places."). Plaintiff testified that when she asked Ms. Arroyo about interpretive services, Ms. Arroyo "jumped to conclusions right away" about Plaintiff's disability needs and denied her service. (*Id.* at 201:11-202:21.)

BCP's version of the events is that, during the November 11 call, Ms. Arroyo first explained to Plaintiff that BCP did not have any child psychologists on staff or any available therapy hours for Plaintiff's son, and that it was only in response to questions from Plaintiff about sign language interpreters that Ms. Arroyo then told Plaintiff that BCP could not provide that service at that time. (Def. 56.1, at ¶ 124.) Ms. Arroyo testified in her deposition that BCP "wouldn't have [had] any problems putting in an interpreter but that—but at first I'd have to be able to offer her the services for the child and that would have still be the same situation in December. I wasn't able to provide mental health services for the child. The interpreter services we would have put in place if that's what she needed." (Arroyo Dep. at 75:9-75:17.) Ms. Arroyo also testified that she was concerned about delivering immediate mental health services to Plaintiff's son and knew that her program would not be able to help him, and that she recommended Coney Island Hospital as a possible resource that might have an opening and interpreter services. (*Id.* at 43:13-44:6, 50:2-50:6.)

Ms. Arroyo's notes from the November 11 call, however, suggest that BCP's lack of interpreter services may have played a role in BCP's denial of mental health services to Plaintiff's son:

> Ms[.] Goldman was informed that the Center did not have available child therapy hours at that time. *Additionally, we did not have interpreter services in place. It was explained to Ms. Goldman that an important part of treatment requires ongoing involvement of the parent and we did not have interpreter services in place at that time.* Ms[.] Goldman was provided with two resources: the Coney Island Hospital and the Advocates for the Blind as a resource where she could possibly obtain further information helpful to her.

(Arroyo Call Summary, Dkt. 50-4, at 493 (emphasis added).)

The Court finds that there remains a factual dispute as to whether Plaintiff's disability was a substantial cause of BCP's denial of mental health services to Plaintiff's son on November 11, 2014. On the one hand, a reasonable juror could find that BCP had no slots available for the requested mental services at the time of November 11 call [5] and that this lack of capacity was the sole or entire reason that BCP denied the services to Plaintiff's son. On the other hand, based on evidence such as Ms. Arroyo's notes of the November 11 call indicating that BCP did not have interpreter services in place and that Ms. Arroyo informed Ms. Goldman that interpreter services were needed for her to participate in her son's treatment (*id.*), a reasonable juror could find that the lack of interpreter services was a substantial cause of BCP's denial of services, and that even if BCP had had the capacity to treat Plaintiff's child, it would have been unwilling to provide the necessary interpreter services for Plaintiff. Thus, whether Defendant's denial of services to Plaintiff's son on November 11, 2014 constituted discrimination under the Acts is a question of fact for the jury.

ii. The December 15, 2014 Call

***7** On December 15, 2014, Plaintiff called BCP a second time. Plaintiff again conveyed a sense of urgency, telling BCP's receptionist that her son needed to see a psychologist "as soon as possible" and that she "needed services right

away." (Sorenson Call Tr., at 2.) Plaintiff then asked to speak to Ms. Arroyo, and the receptionist transferred the call. (*Id.*) The transcript of the December 15 conversation between Plaintiff and Ms. Arroyo reads, in relevant part:

> [Plaintiff]: I think/thought we talked a while ago. Maybe last month. We talked about that, you, umm well, refused to schedule an appointment for my son. I think I am talking to the right person?
>
> Interpreter: [6] Nodding to indicate yes, this is Royo [sic], I think we did talk about that. We did not have any hours available. So gave you names of places that have, that are close to you, and you can call them, that try. That's what we talked about? You remember?
>
> [Plaintiff]: Yes I think so, and also do you remember, also, you told me that, you refuse to provide me sign language interpreter. So. Why (you refuse to provide)
>
> Interpreter overlaps: We did not refuse, we just said we do not have that service available. That is not refusing. That's not what we meant, just that we do not have that service available here.
>
> [Plaintiff]: Ok, but I thought that your place is required to provide any service, any kind of service for deaf and hard of hearing, or other disabilities. But the first time we talked, you seemed like you were refusing to provide interpreters among other things. You never explained why.
>
> Interpreter: Yeah, we do not have that service in place, and so, that's why I gave you that names of different places that will have that provide that interpreter, give that service that you need that right away. So, that is why I gave you the names of different hospitals, that will provide that service, and were you able to get in touch with them and get that service?
>
> [Plaintiff]: No, have not contacted, I did try, but, seems not available either. So?
>
> Interpreter: So umm, Coney Island, near there, or other clinics in the area, give me which places that you have tried, and I can try to call others and see if there are other names available.

(*Id.*) The call continues:

> [Plaintiff]: If you don't mind my asking, I don't understand why your center does not provide sign language interpreters. What if another deaf or hard of hearing person called your center and wanted to set up an appointment for their child or themselves, what will you do?
>
> Interpreter: Well, we would be in the same situation, we cannot provide that service, and we have to try to offer other options, other places that have services that may have that interpreter available.
>
> [Plaintiff]: Ok. I think what you just said is not right. You are supposed to provide interpreters, regardless. Required by law. You have to have something available, there, just like the hopsitals [sic], they will have interpreters there ready, just like you, especially your center, and you don't have any. That's just not right. I just wanted to let you know of that.
>
> Interpreter: I understand, but, I can't tell you that I have it if I don't have it. And I did give you the name of that hospital that have interpreters[.]

(*Id.* at 5.) The transcript of the December 15 call is supplemented by Ms. Arroyo's call summary note for that date, which reads: "In December, Ms[.] Goldman called to ask again if services were available and was again informed we did not have services available." (Arroyo Call Summary, at 493.)

***8** Plaintiff argues that the transcript of the December call shows that she was turned away because of her disability. Plaintiff states that "it is quite difficult to believe" that the "only reason Plaintiff was turned away was because of a lack of clinical hours." (Pl. Reply, Dkt. 52, at 6.) Plaintiff further explains that BCP keeps a wait list for prospective patients when no hours are available, but BCP did not offer the wait list to Plaintiff. (Pl. 56.1 Response, at ¶¶ 76, 125.) Plaintiff alleges that BCP's refusal to offer any wait list accommodation shows that Plaintiff's disability was a substantial reason for the denial of services. (Pl. Reply, at 6-7.)

BCP argues that Ms. Arroyo clearly reiterated at the beginning of the December conversation that BCP did not have any available mental health services. BCP argues that the issue of interpreter services was "moot" because BCP did not have the requested mental health services available. (Def. Mot., at 22.) BCP explains that Ms. Arroyo was focused on "how to get mental health services for Plaintiff's son," while Plaintiff was focused on whether she "would be provided with an ASL interpreter." (*Id.* at 14.) Lastly, BCP argues that Ms. Arroyo's statement that an interpreter service was not "in

place" at the time of the December 15 call does not mean that interpreter services would never be provided. (*Id.* at 16.)

As with the November call, the Court finds that questions of material fact exist as to whether Plaintiff's disability was a "substantial cause" of BCP's denial of therapy services to Plaintiff's son on December 14, 2014. The parties began their second call by discussing BCP's lack of capacity to provide mental health services to Plaintiff's son. At the outset, Plaintiff reminded Ms. Arroyo that she had "refused to schedule an appointment for [her] son." (Sorenson Call Tr., at 3.) Ms. Arroyo responded: "I think we did talk about that. We did not have any hours available. So gave you names of places that have, that are close to you, and you can call them, that try." (*Id.*) This exchange suggests that the primary reason BCP denied Plaintiff's son the requested services was because there were no time slots, not because of Plaintiff's disability.

Ms. Arroyo also explained that she did not "refuse" Plaintiff interpreter services, but rather that the facility did not have them in place at the time of the call. In itself, the fact that BCP could not have provided interpreter services at that moment does not violate the Acts. Hospitals are not required to provide interpreter services for every possible patient or interested party. 42 U.S.C. § 12182(b)(2)(A)(iii) (public accommodations must "take such steps *as may be necessary* to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services") (emphasis added). [7] Thus, a reasonable juror could find that if BCP could not provide the requested mental health services to Plaintiff's son in December 2014, the fact that BCP also could not provide a sign language interpreter for Plaintiff did not violate the Acts, because there was no need for an interpreter.

***9** Yet, Ms. Arroyo's reference in the December 14 call to BCP's inability to provide interpreter services in connection with the denial of mental health services lends support to Plaintiff's claim that BCP's unwillingness to obtain interpreter services for Plaintiff was a substantial cause for its denial of services to Plaintiff's son. It also suggests that Ms. Arroyo's claim that the requested mental health services were unavailable was a pretext. In the call, Plaintiff asked what Defendant would do "if another deaf or hard of hearing person called your center and wanted to set up an appointment." (Sorenson Call Tr., at 5.) Ms. Arroyo responded that BCP would be "in the same situation, we cannot provide that service, and we have to try other options." (*Id.*) While Ms. Arroyo's use of the term "service" is ambiguous—*i.e.*, Plaintiff argues that it refers to interpreter services while Defendant argues that it refers to mental health services—a jury could reasonably interpret Ms. Arroyo's statement to mean that the hospital would not be willing to accommodate deaf people under *any* circumstances. If this were true, it would be a clear violation of the Acts. Because no reasonable inference can be made based on the cold transcript, even in combination with other evidence adduced by Defendant, [8] this question of fact is best resolved by a jury. *Jeffreys v. Rossi*, 275 F. Supp. 2d 463, 475 (S.D.N.Y. 2003) ("It is axiomatic that courts should not assess credibility on summary judgment.").

Similarly, Ms. Arroyo's call summary for the second phone call—in which she states, "[i]n December, Ms[.] Goldman called to ask again if services were available and was again informed we did not have services available" (Arroyo Call Summary, at 493)—is susceptible to different interpretations of what Ms. Arroyo meant by "services." It is equally plausible that she was referring to interpreter services, behavioral therapy services, or both. If the first option, Ms. Arroyo's statement could be construed as an admission that BCP denied Plaintiff's son services because of a lack of interpreter services, a potential violation of the Acts. If the second option, Defendant would be presenting a legitimate and non-discriminatory reason for denying Plaintiff services, *i.e.*, there were no available hours. If both, Defendant could be viewed as admitting that the lack of interpreter services was one reason it denied Plaintiff access, but the question of whether it was a "substantial cause" would remain open.

In sum, the Court finds that there is sufficient evidence upon which a reasonable juror could find that Plaintiff's disability was a "substantial cause" of BCP's denial of mental health services to Plaintiff's son. *See Henrietta D.*, 331 F.3d at 279 (holding that District Court did not err in concluding that "plaintiffs' disabilities were a substantial cause of their inability to obtain services, or that the inability was not so remotely or insignificantly related to their disabilities as not to be 'by reason' of them"); *see also Schiano v. Quality Payroll Sys.*, 445 F.3d 597, 603 (2d Cir. 2006) (noting that "an extra measure of caution is merited in affirming summary judgment in a discrimination action" because direct evidence of discrimination is rare and "often must be inferred from circumstantial evidence found in affidavits and depositions"). Accordingly, the Court denies Defendant's motion for summary judgment. [9]

D. Plaintiff's State Law Claims

***10** The New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL") likewise prohibit disability discrimination. N.Y. Exec. L. § 296(2); N.Y.C. Admin. Code § 8-107. The NYSHRL is construed coextensively with Title III and Section 504. *See Williams v. City of New York*, 121 F. Supp. 3d 354, 364, n. 10 (S.D.N.Y. 2015). However, "claims under the [NYCHRL] must be reviewed independently from and more liberally than their federal and state counterparts." *Loeffler v. Staten Island University Hosp.*, 582 F.3d 268, 278 (2d Cir. 2009) (internal quotations omitted). "Interpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of New York City Human Rights Law[; however,] [with] similarly worded provisions of federal and state civil rights laws [being viewed] as a floor below which the City's Human Rights law cannot fall." *Id.*

Plaintiff alleges that Defendant violated the NYCHRL and NYSHRL. Because the scope of the disability discrimination provisions of the NYCHRL and NYSHRL are similar to those of the Acts, and for the same reasons discussed above, Plaintiff's claims under the NYCHRL and NYSHRL survive summary judgment. *See Camarillo v. Carrols Corp.*, 518 F.3d 153, 158 (2d Cir. 2008) (citations omitted); *see also Rodal v. Anesthesia Grp. of Onondaga*, 369 F.3d 113, 117, n.1 (2d Cir. 2004) ("New York State disability discrimination claims are governed by the same legal standards as federal ADA claims."); *Romanello v. Shiseido Cosmetics Am.*, 00-CV-7201, 2002 WL 31190169, at *7 (S.D.N.Y. Sept. 30, 2002) ("[T]he same standards used to evaluate claims under the ADA also apply to cases involving the NYSHRL and NYCHRL.").

III. Plaintiff's Cross-Motion for Summary Judgment

Plaintiff moves for summary judgment on the issue of liability against Defendant. Because, as discussed above, disputed factual issues remain as to the liability of Defendant, this motion must be denied. The conflicting evidence raises triable issues of fact that preclude summary judgment in favor of either party. A reasonable jury could conclude that Defendant's denial of services to Plaintiff was not substantially caused by Plaintiff's disability, but that determination is a factual question for the jury to resolve.

CONCLUSION

For the reasons stated herein, Defendant's motion for summary judgment is denied, and Plaintiff's cross-motion for summary judgment as to liability is denied.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 1385888

Footnotes

1 Unless otherwise noted, a standalone citation to Defendant's 56.1 Statement (Dkt. 47-2) denotes that this Court has deemed the underlying factual allegation undisputed. Any citations to Defendant's 56.1 Statement incorporates by reference the documents cited therein. Where relevant, however, the Court may cite directly to the underlying document.

2 The parties dispute whether Plaintiff is deaf. In Defendant's 56.1 Statement, Defendant states "Plaintiff is not deaf." (Def. 56.1, at ¶ 4.) Plaintiff responds to this statement: "Disputed. Plaintiff is deaf." (Pl. Response to Def. 56.1, at ¶ 4.)

3 The Sorenson Relay Service Call system involves an interpreter translating the oral conversation into sign language via video. (Goldman Dep., at 65:15-66:3.)

4 By "preemptive", Plaintiff means that BCP's statements were not made in response to any request for accommodation made by Plaintiff and therefore indicate a refusal to provide services to her because of her disability (or an assumption about her disability). (Pl. Mot., at 12.)

5 The Court notes that at the March 15, 2018 oral argument, defense counsel clarified that the only evidence regarding the unavailability of clinical hours is the testimony of Ms. Arroyo and Ms. Kerri Kopelowitz, Associate Director of BCP, and that there is no physical wait list or appointment schedule that establishes this fact.

6 "Interpreter" refers to Arroyo's part of the conversation, as translated by the Sorenson Relay Service Call sign language interpreter.

7 Title III also does not require a defendant-hospital to provide a plaintiff "with her ideal or preferred accommodation; rather, the ADA requires that a defendant provide a plaintiff with an accommodation that is 'reasonable' and permits the plaintiff to participate equally in the good, service, or benefit offered." *Andersen v. North Shore Long Island Jewish Healthcare*, 12-CV-1049, 2013 WL 784391, at *10 (E.D.N.Y. Jan. 23, 2013), *adopted by* 2013 WL 784344 (E.D.N.Y. Mar. 1, 2013);

Goonewardena v. N. Shore Long Island Jewish Health Sys., No. 11–CV–2456, 2013 WL 1211496 at *7, n.10 (E.D.N.Y. Mar. 25, 2013) (rejecting objection to report and recommendation that defendants' denial of plaintiff's request for therapy was a refusal to accommodate his disability because defendants were not obligated under the Acts to provide plaintiff with his preferred treatment).

8 As Defendant highlighted at the March 15, 2018 oral argument, Ms. Arroyo testified in her deposition about the meaning of her statements during the November and December calls, and Defendant has also put forth evidence regarding BCP's mission as a moderate-cost health care provider that serves specifically serves people with mental disabilities, its non-discrimination policies and training, and its past accommodation of hearing-impaired clients and individuals.

9 In reaching this conclusion, the Court acknowledges that, based on the March 15, 2018 oral argument and the overall record, Defendant will likely make a compelling case at trial for a finding of non-liability and that Defendant may, indeed, prove that this is a case exemplifying the proverb that, "no good deed goes unpunished." However, because the Court cannot rule out the possibility that Plaintiff can prevail in this matter and because of the importance of the principle at stake, it declines to grant summary judgment to Defendant.

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648 Fed.Appx. 38
This case was not selected for
publication in West's Federal Reporter.

United States Court of Appeals,
Second Circuit.

Mark HOWARD, Plaintiff–
Appellant–Cross–Appellee,
v.
UNITED PARCEL SERVICE,
Defendant–Appellee–Cross–Appellant.

Nos. 15–957–CV, 15–1272–CV.
|
April 28, 2016.

Synopsis

Background: Hearing-impaired employee brought action against employer under Americans with Disabilities Act (ADA) and New York State Human Rights Law (NYSHRL), alleging employer denied him reasonable accommodation by denying him American Sign Language (ASL) interpreter during two driver certification classes. The United States District Court for the Southern District of New York, Katherine B. Forrest, J., 101 F.Supp.3d 343, granted employer's motion for summary judgment. Employee appealed.

Holding: The Court of Appeals held that there was no causal connection between employee's failure to pass class and employer's denial of his request for ASL interpreter.

Affirmed.

***39** Appeal from the United States District Court for the Southern District of New York (Forrest, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the amended judgment of the district court is **AFFIRMED.**

Attorneys and Law Firms

Philip Marcel Black, Sheldon Karasik, Andrew Rozynski, Eisenberg & Baum LLP, New York, for Plaintiff–Appellant–Cross–Appellee.

Michael T. Bissinger, Day Pitney LLP, Parsippany, New Jersy, for Defendant–Appellee–Cross–Appellant.

PRESENT: RALPH K. WINTER, DENNY CHIN, SUSAN L. CARNEY, Circuit Judges.

SUMMARY ORDER

Plaintiff-appellant-cross-appellee Mark Howard ("Howard") appeals from an amended judgment entered April 2, 2015 following the district court's granting of summary judgment in favor of defendant-appellee-cross-appellant United Parcel Service ("UPS") dismissing his claims of discrimination and failure to accommodate under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12112–17, and New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq*. UPS cross-appeals from the district court's ruling that one aspect of Howard's claim under the ADA was not time-barred. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Howard, who is hearing impaired, has worked at UPS in various jobs since 1999. In 2009, he began efforts to become a full-time driver. In April 2010, he enrolled in a six-day Driver Training Class ("DTC") but was unable to complete it because he missed one day due to car trouble. He took the course again in May 2010 and completed it, but then failed portions of the final examination twice. He requested an American Sign Language ("ASL") interpreter for both courses; UPS declined that request, but provided a number of other accommodations, including a seat in the front row, the right to ask the instructor to face the class whenever possible, and extra time to take the written examination.

Eventually, Howard completed the DTC and passed the examination, with accommodations similar to what he had

previously been provided. He began work as a driver in September 2012, but in January 2013, while backing down a customer's driveway in a UPS truck, he hit a basketball hoop. He failed to report the accident, ***40** and was fired. Subsequently, after consultation with his Union, UPS reduced the termination to a 30–day suspension and Howard returned to a prior position as part-time car washer.

Howard thereafter filed charges of discrimination with the Equal Employment Opportunity Commission and New York State Division of Human Rights. Eventually, he brought the action below, alleging principally that UPS discriminated against him by not providing an ASL interpreter for the April 2010 and May 2010 DTCs, resulting in his failing the final examination.

We affirm the district court's grant of summary judgment dismissing Howard's claims, substantially for the reasons given by the district court in its amended opinion and order. We emphasize the following.

First, a reasonable jury could not have found in favor of Howard with respect to the April 2010 course because, as the undisputed facts showed, he was unable to complete the mandatory six-day course because of car trouble: he did not attend one of the sessions.

Second, with respect to the May 2010 course, a reasonable jury could only have concluded that Howard had not shown a causal link between the lack of an ASL interpreter and his failure to pass the exam. *See Parker v. Sony Pictures Entm't, Inc.,* 260 F.3d 100, 108 (2d Cir.2001) (holding that it is "essential to a finding of discrimination that plaintiff's disability, or the lack of accommodation to that disability, played a 'substantial' role that 'made a difference' to his employer's actions") (citing *Fields v. New York State Office of Mental Retardation and Developmental Disabilities,* 115 F.3d 116, 120 (2d Cir.1997)). The portion of the test that Howard failed was based on written materials he had received twice before. After he failed the test the first time, the instructor reviewed the material he needed to learn to pass, and allowed him to take the exam again. Unfortunately, he did not pass. Moreover, he did pass the DTC examination in 2012 without the assistance of an ASL interpreter, undercutting his argument that an interpreter was vital to his ability to pass the exam.

We have reviewed the parties' remaining arguments on appeal and conclude they are without merit. In light of our disposition of Howard's appeal, we need not reach the merits of UPS's cross-appeal. Accordingly, we **AFFIRM** the judgment of the district court.

All Citations

648 Fed.Appx. 38, 2016 A.D. Cases 134,804

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2003 WL 21435624

Supreme Court, Onondaga County, New York.

Joseph F. HUBEL, Plaintiff,
v.
MADISON MUTUAL INSURANCE COMPANY, Defendant.

Index No. 2001–5404.
|
May 16, 2003.

Synopsis

Insured landlord brought suit against insurer seeking declaration that insurer was obligated to defend and indemnify him in underlying housing discrimination actions under its commercial landlord's insurance policy. Insurer moved for summary judgment, and insured cross-moved for summary judgment. The District Court, Paris, J., held that: (1) refusal to rent to tenant on basis of her familial status was not an accident under policy; (2) claims involved disparate treatment, rather than disparate impact, and as such required proof of intent, precluding finding of accident or occurrence; (3) public policy precluded coverage for claim; and (4) intentional acts exclusion also barred coverage for claim.

Motions granted in part and denied in part.

Attorneys and Law Firms

Hillsberg, Sharp, Corbacio & Vitiello, Vincent G. Corbacio, Esq., for Plaintiff.

Stokes & Knych, LLC, Peter W. Knych, Esq., for Defendant.

DECISION

PARIS, J.

***1** The Defendant's counsel filed a Motion for Summary Judgment, dated January 2, 2001, seeking a declaration that Defendant has no duty to defend or indemnify Plaintiff in two related underlying actions. Plaintiff opposed the Motion and filed a Cross–Motion, dated January 16, 2001, seeking Summary Judgment directing Defendant to indemnify Plaintiff for compensatory damages and legal expenses which Defendant failed to pay under the terms of its insurance policy. Both counsel appeared and submitted oral arguments with respect to the motions. In addition, the Court has reviewed and considered the Memorandum of Law in Support of Defendant's Motion for Summary Judgment, dated January 2, 2001; the Plaintiff's Memorandum of Law, dated January 16, 2001; the Reply Affidavit of Peter W. Knych, dated February 6, 2001; the Defendant's Reply Memorandum of Law in Support of its Motion for Summary Judgment, dated February 5, 2001; Plaintiff's Reply Memorandum, dated February 13, 2001; the letter submission from Peter W. Knych, Esq., dated February 21, 2001; the letter submission from Peter W. Knych, Esq., dated November 9, 2001; the letter submission from Vincent G. Corbacio, Esq., dated November 14, 2001; and the letter submission from Peter W. Knych, Esq., dated November 16, 2001.

Plaintiff herein is a landlord who owns and rents apartment units and houses, including a one-family house located at 8187 Chianti Circle, North Syracuse, New York. In September 1995, Plaintiff placed an ad in the newspaper to rent out the Chianti Circle residence, advertising the property as a "3/4 bedroom house". At that time, Cathy Shavalier, then known as Cathy Smith, was looking for a house to rent for herself and her six children who ranged in ages from four through sixteen. She inspected the property with Plaintiff and later submitted an application, together with a $100.00 down payment/security deposit. At or about the time she submitted the application, Ms. Shavalier advised Plaintiff that she had six children and further specified this fact in her application. After submitting the application and check, Shavalier was under the impression that she would be renting the house commencing on October 1, 1995.

Plaintiff admits that he read Shavalier's application (which included a statement that she had six children) when she delivered it to him, but made no decision to reject it at that time. He denies advising Shavalier that he would be leasing the property to her, and avers that he accepted her application for consideration among the pool of applicants. Thereafter, on September 25, 1995, three adults with no children applied to rent the Chianti Circle property. Plaintiff decided to accept their application, and on that same day, he wrote a letter to Shavalier rejecting her application and stating, "It is felt that occupancy by six children would be excessive both in terms of space and inordinate wear and tear on the property." Shavalier

received Plaintiff's letter just four days before she anticipated moving into the Chianti Circle residence.

***2** In 1995, Madison Mutual Insurance Company insured Plaintiff with respect to the Chianti Circle property under a commercial landlord's liability policy of insurance.

On or about September 24, 1996, Shavalier filed a housing discrimination complaint with HUD alleging that Plaintiff had discriminated against her because of familial status and in violation of the Fair Housing Act. Shavalier further alleged that Plaintiff's actions were intentional, willful and taken in wanton disregard for Shavalier's rights. That original complaint was filed under an incorrect name, therefore, a second complaint was filed in September, 1997.

Also in September, 1997, Shavalier filed a complaint in the United States District Court in the Northern District of New York alleging discrimination in the rental of housing because of familial status. Specifically, Shavalier alleged that Plaintiff herein violated the Fair Housing Act of 1968 and New York State Executive Law Section 296. Shavalier contended that Hubel's "actions constituted a printed and published notice and statement, with respect to the lease of the dwelling, which indicated a preference, limitation and discrimination, based on the number of children in Plaintiff's family". Further, Shavalier alleged that Plaintiff acted intentionally and maliciously and/or negligently, carelessly and recklessly without regard for and to damage the rights and feelings of Shavalier.

Upon receipt of Shavalier's HUD Complaint and Federal Court Summons and Complaint, Plaintiff, a former insurance company claims adjuster, contacted his insurance agent and discussed whether he should notify Defendant, Madison Mutual Insurance Company of the claim. Plaintiff admits that he and his agent decided there was no coverage under the policy and therefore they did not notify Defendant of the claim at that time. There was no written record of this discussion or decision.

In October 1997, Plaintiff retained Attorney Corbacio and proceeded to answer the HUD and Federal Court complaints and to engage in discovery.

Thereafter, on May 8, 1998, Plaintiff notified Defendant of the claim. Defendant investigated the claim and promptly disclaimed coverage by issuing a disclaimer letter on June 8, 1998.

Ultimately, Plaintiff settled the Federal Court action and HUD discontinued its action. Plaintiff submits that he has incurred attorneys fees of $8,710.00 in connection with these matters, and he seeks reimbursement for same in the instant action, together with the $6,000.00 he paid Shavalier in settlement of her claims.

Defendant contends that it is entitled to summary judgment because, as a matter of law, Plaintiff's potential liability does not arise out of "an occurrence" and therefore is not covered under the insurance policy. In addition, Defendant argues that Plaintiff violated the notice conditions of the policy. Finally, Defendant submits that Plaintiff's potential liability is excluded by the policy's intentional injury/damage exclusion.

***3** In opposing Defendant's Motion, Plaintiff contends that the alleged discriminatory act arose from an occurrence (the denial of Shavalier's application to rent) arising from Plaintiff's ownership and use of the insured property which allegedly resulted in bodily injury (mental anguish and distress), and the claim is not excluded from coverage as an intentional tort because intent is not an element of the cause of action. Plaintiff submits that the allegations of Shavalier's complaints created a reasonable inference that coverage existed and that, at the minimum, Defendant had an obligation to defend against the two actions. Plaintiff argues that intentional conduct is not required to be shown, nor is it a necessary element of a housing discrimination claim under the Federal Housing Act because liability rests on whether or not discrimination resulted from the conduct complained of regardless of the intent of the accused. Therefore, according to Plaintiff, the conduct complained of constitutes an occurrence under the policy for which Plaintiff should be insured.

In addition, Plaintiff submits that he notified his insurance agent of the claim as soon as he had notice of the claim being made against him. Finally, Plaintiff argues that the Defendant has failed to establish that the allegations of the complaints fall within an exclusion set forth in the insurance policy.

In Reply, Defendant contends that a distinction must be drawn between disparate impact discrimination and disparate treatment discrimination. Shavalier did not allege disparate impact discrimination by Plaintiff. That is, there is no allegation that Plaintiff utilized a facially neutral criterion which resulted in a significant discriminatory pattern. Rather, Shavalier alleged that Hubel engaged in disparate treatment

discrimination by denying her tenancy because of her familial status.

Defendant further submits that, since 1963, the New York State Insurance Department has consistently opined that it is against public policy to provide insurance coverage against liability arising out of discriminatory acts except when that discrimination is based solely on either a disparate impact theory or a vicarious liability theory. Defendant argues that Shavalier's inclusion of a negligent discrimination theory in the complaint does not create a duty to defend and indemnify in this case because there is no such thing as "negligent" disparate treatment discrimination.

Finally, Defendant contends that if the Court finds it has a duty to defend Plaintiff, there are questions of fact which preclude summary judgment on the issue of indemnification.

Plaintiff commenced the pending action seeking a declaration that Madison Mutual was obligated to defend and indemnify him for the HUD and Federal District Court actions that were commenced against him by Cathy Shavalier. It is undisputed that Hubel purchased a commercial landlord's policy of insurance from Madison Mutual Insurance Company which was in effect in 1995. The terms of that policy obligate Defendant to defend and indemnify Plaintiff under certain circumstances for allegations of bodily injury or property damage caused by an occurrence. Under the policy Defendant agreed to

> ***4** [P]ay up to our limit of liability, all sums for which the insured is legally liable because of bodily injury or property damage caused by an occurrence to which this coverage applies.

See: Defendant's Exhibit No. M, Policy, Form FL–OLT, page 2 of 6, Coverage L–Personal Liability Coverage. The policy defines "occurrence" with the following language: "Occurrence means an accident, including continuous or repeated exposure to substantially similar conditions." See: Defendant's Exhibit No. M, Policy, Form F–OLT, Policy Definitions, Pages 1 and 2 of 6. Bodily injury is defined in the policy to include "bodily harm, sickness or disease to a person including required care, loss of services and death resulting therefrom." See: Defendant's Exhibit No. M, Policy, Form FL–OLT, Policy Definitions, Pages 1 and 2 of 6.

An insurer is obligated to defend an insured if the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased. *Ruder & Finn v. Seaboard Sur. Co.,* 52 N.Y.2d 663, 669–670, 439 N.Y.S.2d 858, 422 N.E.2d 518 (1981), *reargument denied* 54 N.Y.2d 753, 443 N.Y.S.2d 1031, 426 N.E.2d 756. To make this determination, the Court must first examine the four corners of the complaint in issue. The HUD complaint filed against Plaintiff alleged that "... defendant Joseph F. Hubel has discriminated against plaintiff Cathy S. Smith because of familial status and in violation of the Fair Housing Act. The discriminatory actions of the defendant were intentional, willful, and taken in wanton disregard for the rights of plaintiff Cathy S. Smith". Similarly, the Federal District Court complaint alleged that "The Defendant's [Hubel's] actions constituted a printed and published notice and statement, with respect to the lease of the dwelling, which indicated a preference, limitation and discrimination, based on the number of children in the Plaintiff's family. By engaging in the unlawful conduct described above, the Defendant acted intentionally and maliciously and/or negligently, carelessly, and recklessly without regard for and to damage the rights and feelings of the Plaintiff Cathy Shavalier." Specifically, the complaint alleged that Hubel has discriminated against the Plaintiff on the basis of familial status in violation of the Fair Housing Act and the New York State Executive Law.

In its plain meaning, "accident" is defined as "a happening that is not expected, foreseen, or intended". Webster's New World Dictionary. Considering every fair inference which can be afforded Plaintiff, and without determining the validity of Shavalier's allegations, the Court finds that Hubel's act of refusing to rent the Chianti Circle property to Cathy Shavalier can in no way be categorized as an accident or an occurrence within the meaning of the commercial landlord's policy of insurance. Plaintiff's September 25, 1995 letter to Shavalier unequivocally stated that "It is felt that occupancy by six children would be excessive both in terms of space and inordinate wear and tear on the property". There is nothing accidental about a single, specific and express decision not to rent to a prospective tenant solely due to the size and makeup of her family. See e.g.,: *Board of Education of East Syracuse–Minoa Cent. School Dist. v. Continental Insurance Company,* 198 A.D.2d 816, 604 N.Y.S.2d 399 (4th Dept., 1993).

***5** Plaintiff argues that intent is not an element of a cause of action for familial discrimination and therefore the allegations of Shavalier's complaints constitute an "occurrence" within the meaning of the policy of insurance. The Court recognizes that a violation of the Fair Housing Act may be established through proof of discriminatory intent *or* by showing a disproportionate adverse impact otherwise known as a significant discriminatory effect. See: *Hanson v. Veterans Administration,* 800 F.2d 1381 (5th Cir. 1986); *Arthur v. City of Toledo, Ohio,* 782 F.2d 565 (6th Cir.1986); *Robinson v. 12 Lofts Realty, Inc.,* 610 F.2d 1032 (2d Cir.1979).

A disparate impact analysis examines a facially-neutral policy or practice for its differential impact or effect on a particular group. *Sobel v. Yeshiva Univ.,* 839 F.2d 18, 28 (2d Cir.1988). Disparate treatment analysis, on the other hand, involves differential treatment of similarly situated persons or groups. The line is not always a bright one, ... but does adequately delineate two very different kinds of discrimination claims. *Huntington Branch, NAACP v. Town of Huntington,* 844 F.2d 926, 933–934 (2d Cir.1988).

To establish the existence of a significant discriminatory effect, there must be an allegation of a "significant discriminatory pattern". For example, a facially neutral policy may nonetheless violate the Fair Housing Act if it has a disproportionate adverse impact on minorities. See: *Edwards v. Johnstown County Health Department,* 885 F.2d 1215 (4th Cir.1989); *American Management Association v. Atlantic Mut. Ins. Co.,* 168 Misc.2d 971, 641 N.Y.S.2d 802, *aff'd* 234 A.D.2d 112, 651 N.Y.S.2d 301 (1st Dept., 1996). The Court finds that there is no allegation in either the HUD Complaint or the Federal District Court Complaint that Plaintiff had or utilized a facially neutral policy which resulted in a pattern of discrimination against persons with large families (a group which included Shavalier). Nowhere in her pleadings does Shavalier refer to other "victims" of Plaintiff's discriminatory policies. Similarly, there is no allegation that Plaintiff engaged in a pattern of familial discrimination whereby his decisions resulted in prospective tenants with large families being denied tenancy. Shavalier does not even hint at any "test renters" who were denied rental based upon family size and composition. Plainly, there is no allegation that Plaintiff applied a "facially neutral criterion" that resulted in a pattern of apparent discrimination. As such, the subject complaints do not in any way state a cause of action for disparate impact discrimination.

Rather, the allegations accuse Plaintiff of specifically deciding not to rent to Shavalier on the basis of her family status and in violation of the Fair Housing Act. There is no question that the complaints state a cause of action for disparate treatment discrimination. However, disparate treatment discrimination, by its very definition, results from intentional acts. Clearly, an intentional act is not an "accident". Nor is it an "occurrence" within the meaning of the applicable commercial landlord policy of insurance.

***6** In opposing Defendant's motion, Plaintiff contends that the Federal District Court action also alleges that Hubel acted "negligently, carelessly and recklessly" and these allegations are covered under the policy of insurance. The Court notes that there is no allegation of negligence in the HUD complaint. Further, the Court finds that the law does not provide a cause of action for negligent discrimination. More importantly, Shavalier's allegations of negligence "do not change the gravamen of the complaint from one alleging intentional acts and violations of Federal and State statutes to one involving negligent conduct (*see, e.g., New York Cas. Ins. Co. v. Ward,* 139 A.D.2d 922, 527 N.Y.S.2d 913)," *Board of Education, supra* at 817, 604 N.Y.S.2d 399. The Court is not required to accept Shavalier's legal characterization of the causes of action alleged in the complaint. Rather, the Court must look to the facts alleged to determine the nature of the claim. See: *County of Columbia v. Continental Ins.,* 189 A.D.2d 391, 595 N.Y.S.2d 988 (3rd Dept., 1993) (citing *Allstate Ins. Co. v. Mugavero,* 79 N.Y.2d 153, 162–163, 581 N.Y.S.2d 142, 589 N.E.2d 365 (1992)), *aff'd* 83 N.Y.2d 618, 612 N.Y.S.2d 345, 634 N.E.2d 946 (1994). In so doing, and without determining the validity of Shavalier's accusations, the Court finds that, at best, Shavalier has alleged a cause of action for disparate treatment discrimination.

The Court has considered Plaintiff's argument that the alleged discrimination of Shavalier was the unintended result of Hubel's intentional acts and, therefore, her claim should have fallen within the coverage afforded by the policy. However, insurance coverage has been denied in such situations on the basis that once the intentional act has been alleged, then harm is inherent and coverage does not apply. *Jacobs v. Aetna Casualty and Surety Company,* 216 A.D.2d 942, 628 N.Y.S.2d 894 (4th Dept., 1995), *appeal dsmsd* 86 N.Y.2d 838, 634 N.Y.S.2d 446, 658 N.E.2d 224, *lv to appeal denied* 87 N.Y.2d 806, 641 N.Y.S.2d 597, 664 N.E.2d 508 (1996). Moreover, the New York State Insurance Department has consistently stated that it is against this State's public policy to provide insurance coverage with respect to acts of discrimination except when

a claimant alleges disparate impact discrimination or a theory of vicarious liability. See: Circular letter from New York State Insurance Department, dated May 31, 1994; *American Management Association, supra.* Looking within the four corners of Shavalier's complaints, the Court finds no allegations which plead or can be construed to plead a cause of action for disparate impact discrimination or vicarious liability. As such, there can be no coverage afforded to Plaintiff under the applicable insurance policy.

The Court has read and considered the cases of *U.S. v. Security Management Co., Inc.,* 96 F.3d 260 (7th Cir.1996); *Soules v. U.S. Dept. Of Housing & Urban Dev.,* 967 F.2d 817 (2d Cir.1992); and *Ragin v. Harry Macklowe Real Estate Co.,* 6 F.3d 898 (2d Cir.1993), submitted by Plaintiff in support of his argument that intent is never a required element of a Fair Housing claim. The Court notes that each of these cases involved disparate impact discrimination claims. Clearly, a plaintiff need not prove intent or willful conduct to successfully establish a pattern of discrimination. In such cases, proof of intent is specifically *not* required. In the instant case, Shavalier has made no allegation that Hubel engaged in a pattern of discrimination. Rather, she alleges that he intentionally discriminated against her individually by virtue of his unequivocally stated decision not to rent to her because of her family size and status. Insofar as Shavalier's allegations, if proven, could only establish disparate treatment discrimination, the Court finds that proof of intent would be required. Therefore, the cases relied upon by Plaintiff are inapplicable to the facts at bar.

***7** Finally, assuming arguendo that the allegations of Shavalier's complaints state an "occurrence" within the terms of the commercial landlord's policy, the Court finds that the subject insurance policy contains an exclusion which provides that the policy does not apply to liability "h. Caused intentionally by or at the direction of any insured." See: Defendant's Exhibit No. M, Policy, Form FL–OLT, Exclusion h, p. 4 of 6. Insofar as disparate treatment discrimination (the form of discrimination plead by Shavalier) results from an intentional act, the Court finds that the claims are excluded from coverage under the policy. See: *Jacobs, supra.*

Given the foregoing determinations, the Court finds that Defendant did not owe a duty to defend Plaintiff with respect to Shavalier's HUD and Federal District Court complaints. In so deciding, the Court does not reach the issue of the timeliness of Plaintiff's notice to Defendant. Moreover, since an insurer's duty to defend is broader than its duty to indemnify, and the Court has found that Defendant did not have a duty to defend Plaintiff, the Court finds no basis to require Defendant to indemnify Plaintiff in this matter.

In light of the above, and after due deliberation, the Court finds that Defendants' Motion for Summary Judgment must be granted, and Plaintiffs' Cross–Motion for Summary Judgment must be denied. Defendants' counsel shall submit to the Court a proposed Order in compliance with this Decision on notice to Plaintiffs' counsel.

All Citations

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