

STATE OF VERMONT
WASHINGTON COUNTY

FILED

2007 APR - 5 P 3: 37

NEAL BESSER,
Plaintiff

v.

DEN RESTAURANT,
Defendant

Washington Superior Court
Docket No. 218-4-06 Wncv

DECISION

Cross-Motions for Summary Judgment
and

Defendant's Motion for Relief from Vexatious Litigation

In March 1991, Plaintiff Neal Besser was denied entry to the Den Restaurant in Waitsfield, where an individual whom Plaintiff identifies as an ex-girlfriend was employed. Defendant-restaurant has refused consistently since then to allow Plaintiff to return.

In a forty-page narrative Complaint, Plaintiff claims that the Defendant-restaurant's actions, in barring him from its premises, constitute unlawful discrimination under the Vermont Fair Housing and Public Accommodations Act, deprivation of certain Constitutional rights, and violation of the Americans With Disabilities Act.

Defendant, represented by Attorneys Paul Gillies and Richard Grossman, filed a Motion for Summary Judgment and for an Order of Relief from Further Vexatious Litigation on August 4, 2006. Plaintiff, *pro se*, filed a Motion for Summary Judgment on September 14, 2006. The Court first addresses the merits of the cross-motions for summary judgment, and then addresses the question of relief from further litigation.

Summary Judgment

Summary judgment procedure is "an integral part of the rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Morrisseau v. Fayette*, 164 Vt. 358, 363 (1995) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

"Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in

determining whether a genuine issue of material facts exists. *Price v. Leland*, 149 Vt. 518 (1988). However, summary judgment is mandated where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251 (1989).

The facts themselves are largely undisputed.¹ Plaintiff Neal Besser traveled to the Den Restaurant in Waitsfield, around October of 1990, where he left a coffee mug, apparently as a birthday gift, for an individual he identifies as an ex-girlfriend named Laurie Mead. "The mug was white and had a red-colored heart on it, with the inscription 'Somebody Loves me in Burlington,' and at the bottom the name ABEL in capitalized letters." Complaint pp. 2-3.

The next time Plaintiff tried to enter the Den Restaurant, in March 1991, he was refused entry. Complaint, p. 4. Plaintiff demanded a reason for his banishment from the restaurant, and he got one: "I recall on at least one occasion long afterwards which I had to talk to the owner over the phone he alleged which I believe became his main pretext to evict me that I had supposedly 'harassed' my ex-girlfriend who was his employee with the birthday gift . . ." Complaint, p. 4. Plaintiff denies any intention "to harass, annoy, or disturb Laurie in any manner by the coffee mug, or to intrude upon her relationship with her husband, Dennis . . . who . . . threatened to 'beat me up' for calling [Mead] over the phone to talk to her once when I was in Waitsfield . . ." Complaint, p. 4.

Plaintiff repeatedly asked to be re-admitted to the Den Restaurant, and the restaurant repeatedly declined. It is undisputed that Defendant caused the Washington County Sheriff's Department to serve upon Plaintiff, in hand, on January 31, 1995, a "Notice Against Trespass," reading, "You are prohibited from entering in any way THE DEN restaurant or the grounds surrounding THE DEN restaurant." Defendant's Motion for Summary Judgment, p. 2 and Exhibit A.

The gist of Plaintiff's complaint, in his own words, is that Defendant's given reason for his banishment – that he was barred because of repeated and unwelcome efforts to contact Mead – "constitutes an insufficient basis upon which to commit subsequent unlawful discrimination against me," by refusing Plaintiff entry. Complaint, p. 4. The court has carefully reviewed the thirty-seven pages of Plaintiff's narrative that follow the quoted assertion, but these amount to a series of hypotheses and conclusory legal statements.

Plaintiff offers innumerable possible motives for Defendant's exclusion of him, ranging from his status as an ex-smoker and opponent of environmental tobacco smoke, to his status as a person with a disability, to his relationship with Christianity and Judaism, to his status as an out-of-state resident and former University of Vermont student. Crucially, however, the Complaint does not set forth facts that suggest that Defendant's motive for excluding Plaintiff from the Den Restaurant is or was in any way

¹ Plaintiff has not submitted a Rule 56(c)(2) statement of facts, and Defendant's statement of facts is brief. Nonetheless, the facts stated appear to be undisputed.

illegal. He does not set forth facts to support a claim of discrimination based on disability, although he alleges a disability.² Indeed, Plaintiff's response to Defendant's instant motion describes in detail, at pp. 8-11, Plaintiff's own belief that his banishment from the Den Restaurant was motivated principally by an unwelcome gift to a since-married former romantic interest.

Defendant's Answer, filed June 20, 2006, asserts affirmative defenses of statute of limitations and *res judicata*. Although either of these technical grounds might be dispositive, Defendant does not pursue the defenses in its instant Motion for Summary Judgment, but claims instead that based on the complaint and undisputed facts, relief is unavailable to Plaintiff as a matter of law under the circumstance he describes.

As a general rule, a Vermont business may eject any person it wishes, for any reason it wishes: good or bad; thoughtful or arbitrary; accurate or baseless. An important and familiar exception to this rule, of which Plaintiff is aware, is that a place of public accommodation may not discriminate against persons on the basis of particular characteristics -- such as race, creed, disability, or sexual orientation -- which the state or federal law recognizes as inherently unfair.

In Vermont, the chief anti-discrimination statute is the Vermont Fair Housing and Accommodations Act, 9 V.S.A. § 4500 *et seq.*, which incorporates by reference the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* The Act is remedial in nature and, as such, must be liberally construed. *Human Rights Commission v. Benevolent & Protective Order of Elks*, 176 Vt. 125, 131 (2003). Even so, the Act and related state and federal constitutional jurisprudence sometimes are misunderstood as requiring something like due process before a person can be ejected from a private establishment. When Plaintiff complains that his exclusion from the Den Restaurant because of an unwanted gift "constitutes an insufficient basis upon which to commit subsequent unlawful discrimination against me," he is restating the same misunderstanding, together with the mistaken legal conclusion that follows from it.

Nothing in our law requires that Defendant have a sufficient or reasonable basis, or any basis at all, for refusing Plaintiff entry as long as applicable statutes are not otherwise violated. Defendant's reasons for barring plaintiff from the Den Restaurant may be unreasonable without necessarily being unlawful. Although Plaintiff may belong to one or more groups protected by statute, it remains Plaintiff's burden to show a causal relationship between membership in a protected group and the action alleged to constitute discrimination. Plaintiff has not met this burden. The Complaint does not show or suggest, by alleged fact or circumstance, any discriminatory basis for Plaintiff's decision to ban Defendant from the Den Restaurant. Therefore, Plaintiff's Motion for Summary Judgment must be denied, and Defendant's Motion for Summary Judgment must be granted.

² Plaintiff's pleadings indicate that his father is "representative payee for [Plaintiff's] Social Security benefits," which benefits arise from a debilitating mental illness. See Complaint, pp. 6, 15. The Court assumes Plaintiff to be competent in his own affairs, and weighs the credibility and merits of the Complaint accordingly.

Motion for Relief from Vexatious Litigation

Defendant notes the Plaintiff's history of subjecting others to litigation, and asks the court "to protect Defendant and others from the practices of Plaintiff" by issuing "an order directing Plaintiff not to file additional lawsuits in this Court without express permission of the Court, after a review of the basis for the litigation to ensure that it has merit." Plaintiff does not dispute that he has engaged in considerable litigation.

Plaintiff notes in his Complaint that he previously filed a complaint against Defendant with the Vermont Human Rights Commission, in the Summer of 2002, and the complaint was found not to state a *prima facie* case of unlawful discrimination. Complaint, pp. 24, 30. Plaintiff subsequently "submitted a lawsuit against the Human Rights Commission to Washington County Superior Court" on the basis of the Commission's allegedly errant findings. Complaint, p. 32. Plaintiff reports that his suit against the Commission was dismissed as well, and a Motion to Reconsider denied. Complaint, p. 34. Plaintiff also notes that he sued the individual he identifies as his ex-girlfriend, in this Court, in 1994, "for repossession of [a coffee] mug from her for the purpose of eliminating any unintended source of annoyance." Complaint, p. 27.

The history shows that there is a risk that further litigation and re-litigation may continue. By his pleadings, Plaintiff promises as much. In his "Reply in response to defendant's Motion for Summary Judgment and for an Order of Relief from Further Vexacious [sic] Litigation" (hereinafter "Reply"), filed August 31, 2006, Plaintiff calls Defendant's motion "unnecessary" and "presumptuous," but goes on to warn that, should the instant action fail, "defendant may as well know that I'll have no choice but to pursue criminal charges against the defendant for committing hate crimes against me, with the Vermont Attorney General's Office, and to file suit against him for committing unlawful discrimination to the U.S. District Court, which he may wish to avoid," by agreeing to a \$300,000-plus settlement. Reply, pp. 4-5. Plaintiff himself notes, "I have sued Radio Station WDEV in U.S. District Court of Vermont calling upon the Court to issue an Order compelling the station to change their offensive call letters," or else be subject to legal penalties. Complaint p. 20. Plaintiff notes that the WDEV suit was dismissed as "fanciful" and "frivolous" by the United States District Court, that an appeal was dismissed "for similar reasons," and that he has submitted a complaint of the same substance to the Federal Communications Commission. Complaint, p. 20.

Nonetheless, Defendant's request is quite broad, covering all complaints that Plaintiff might file in this court about any matter and in any capacity and against any defendant. Furthermore, Defendant relies on the elements of civil causes of action for abuse of process or malicious prosecution in support of its request, and asks the court to adopt those as a basis for its requested broad order, apparently based on inherent judicial authority. Abuse of process and malicious prosecution are civil causes of action. The court declines to rely on their elements within the framework of inherent judicial authority to issue the highly limiting order Defendant requests, particularly as there is an alternative process incorporated into the civil rules.

Rule 11 of the Vermont Rules of Civil Procedure provides a basis upon which a court may determine whether a suit is improperly motivated or filed without proper support, and furthermore the rule sets forth the procedural steps to be taken and the standards to be applied in considering such a request. If the court finds a violation of Rule 11 standards, it has authority to impose sanctions.

Defendant has not framed its request within the framework of Rule 11, which it could have done. Rule 11 (c)(1)(A) sets forth the procedural requirements necessary for the court to consider a motion initiated by a party, and the prerequisites have not been met in this case. Therefore the court does not have a Rule 11 motion properly before it. Although Rule 11 (c)(1)(B) provides for the court to commence a Rule 11 inquiry on its own initiative, the result of the rulings on the summary judgment motions is judgment for Defendant and termination of the case. Therefore, the court declines to prolong the litigation by initiating a Rule 11 proceeding on its own motion.

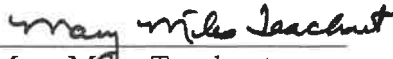
Therefore, Defendant's motion is denied. Plaintiff should be aware, nonetheless, of the possibility that in the event further litigation is pursued, his pleadings may be examined under the standards of Rule 11, either at the request of a defendant or on the court's own motion. Sanctions could be imposed if warranted.

ORDER

For the foregoing reasons,

Defendant's Motion for Summary Judgment is *granted*;
Plaintiff's Motion for Summary Judgment is *denied*; and
Defendant's Motion for an Order of Relief from Further Vexacious Litigation is *denied*.

Dated at Montpelier, Vermont this 4th of April, 2007


Mary Miles Teachout
Presiding Judge