SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0843-21

DARIEN COOPER,

Plaintiff-Appellant,

v.

ROGO BROTHERS, INC.,
ROGO BROTHERS, INC.,
d/b/a ELEMENTS MASSAGE,
and ELEMENTS MASSAGE,

Defendants-Respondents.

Argued November 17, 2022 - Decided December 7, 2022

Before Judges Whipple and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-2013-21.

Deborah L. Mains argued the cause for appellant (Costello & Mains, LLC, attorneys; Deborah L. Mains, on the briefs).

Jacqueline Murphy argued the cause for respondents (Wood Smith Henning & Berman, LLP, and Michelle M. Arbitrio (Wood Smith Henning & Berman, LLP) of the New York and Connecticut bars, admitted pro hac

vice, attorneys; Jacqueline Murphy and Michelle M. Arbitrio, on the brief).

PER CURIAM

The issue presented in this appeal is whether employers should be strictly liable for an employee's conduct in the context of public accommodation discrimination. We hold employers are not strictly liable for an employee's discriminatory conduct. Rather, trial courts should utilize agency principles to determine whether an employer is vicariously liable for an employee's discriminatory conduct.

Plaintiff Darien Cooper appeals from the trial court's order dated October 21, 2021, dismissing his complaint for public accommodation discrimination against defendants, Rogo Brothers, Inc., Rogo Brothers Inc., d/b/a Elements Massage, and Elements Massage (defendants or Elements Massage) pursuant to Rule 4:6-2(e). We affirm in part, vacate in part, and remand for discovery.

I.

We derive the following from plaintiff's complaint. Plaintiff is a gay man who presented to Elements Massage where Justine Middleton, a masseuse, was assigned to him. During the course of the massage, Middleton asked plaintiff about a tattoo on his arm which led to a conversation where Middleton shared information about her Christian faith. When plaintiff subsequently mentioned

he had a boyfriend, Middleton "gave her opinions about homosexuality in a demeaning and discriminatory manner." Specifically, Middleton allegedly told plaintiff gays "do not follow God's design," equated being gay with pedophilia and insinuated being gay is a lifestyle "choice." Although plaintiff allowed the massage to be completed, he alleges Middleton's comments upset and humiliated him. He left Middleton a note which stated, "when you condemn love you condemn God, that is not our place. I will pray for you." Plaintiff's complaint alleges discrimination in a place of public accommodation in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49.

II.

Plaintiff notes courts have been reluctant to give broad interpretation to the provision of the LAD prohibiting public accommodation discrimination. More particularly, plaintiff contends, despite the prohibition of discrimination by an employee under the statute in the context of public accommodation, trial courts and appellate courts have declined to hold places of public accommodation strictly liable for discrimination except when the acts are committed by an owner or upper-level management at a retail operation. Plaintiff argues this narrow reading of the statute undercuts the goals of the LAD and is inconsistent with a plain reading of the statute.

Plaintiff contends we should hold employers strictly liable for conduct of employees. In the alternative, plaintiff requests the court adopt the standard used in Lehmann v. Toys R Us, 132 N.J. 587 (1993), in hostile work environment cases.[1] Importantly, plaintiff argues, if we do not adopt a strict liability standard concerning employer liability for employee conduct in the context of public accommodation discrimination, he is entitled to conduct discovery to determine if defendants are vicariously liable.

Defendants counter the trial court properly dismissed plaintiff's complaint because defendants cannot be held vicariously liable for the statements made by Middleton. Defendants argue Lehmann is distinguishable, and the vicarious liability standard utilized therein should not apply in this case as the Lehmann case involved employment discrimination, and public accommodation cases are

[1] Plaintiff also relies on the Third Circuit Court of Appeals' decision Yucis v. Sears Outlet Stores, 813 Fed. Appx. 780 (2020), which is non-precedential. There, the court predicted the New Jersey Supreme Court would apply a vicarious liability standard for proving public accommodation discrimination committed by employees.

distinct from employment discrimination cases. Therefore, the same principles cannot be utilized in both cases.[2]

Defendants contend Middleton, in discussing her religious beliefs with plaintiff, was not acting within the scope of her employment nor speaking on behalf of the employer. Defendants further argue they did not withhold or deny plaintiff a massage because of his sexual orientation. Defendants claim Middleton shared her religious beliefs in response to plaintiff's requests for Middleton's opinions, and the statements were not designed to discriminate against plaintiff. In short, defendants claim Middleton did not discriminate against plaintiff, but instead offered information regarding her religious beliefs, and there is no allegation she refused to provide service to plaintiff nor was there any effort to deter plaintiff from further patronage at the spa.[3]

The trial judge assumed, for the purposes of deciding the motion to dismiss, Middleton's comments were intended to offend or discriminate and

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[2] Defendants also assert we should adopt the vicarious liability test utilized in Yucis. We would note the Yucis court relied on an agency test derived from Lehmann. Yucis, 813 Fed. Appx. at 784.

[3] Defendants further argued plaintiff's initial brief was filed a day late and should not be considered. We need not address this issue because plaintiff filed a separate motion for his brief to be considered as timely filed, which we granted on May 18, 2022.

caused plaintiff to believe he was not welcome to return to the business.[4] The trial court further noted there is no indication in the complaint defendants knew of Middleton's comments or that they condoned them. The court ultimately relied on the agency principles set forth in Restatement § 219 to determine plaintiff had not established vicarious liability on the part of defendants.[5] Accordingly, the court granted defendants' motion to dismiss.

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[4] The only issue raised on appeal is whether defendants should be held strictly or vicariously liable for Middleton's conduct. We need not address defendants' arguments Middleton's statements were not discriminatory in nature.

[5] The trial court relied on Yucis in applying Restatement § 219. In Yucis, the plaintiff alleged she was sexually harassed by a sales manager while shopping for a refrigerator at a Sears store. Because our Supreme Court has not yet addressed the circumstances under which an employer may be held liable for public accommodation discrimination, Yucis was required to predict how the Supreme Court would decide the issue. Yucis, 813 Fed. Appx. at 783. The plaintiff in Yucis, like plaintiff in the matter before us, argued that employers should be strictly liable for an employee's discriminatory conduct. Id. at 784. The plaintiff there also relied on Turner v. Wong, 363 N.J. Super. 186 (App. Div. 2003), and Franek v. Tomahawk Lake Resort, 333 N.J. Super. 206 (App. Div. 2000). Yucis distinguished Turner and Franek, as those cases involved harassment committed directly by the establishment's owners and did not address strict liability or vicarious liability issues. Ibid. We agree Turner and Franek do not provide guidance as to whether employers should be held strictly liable for the conduct of employees.

Yucis ultimately determined Godfrey v. Princeton Theological Seminary, 196 N.J. 178 (2008), provided an analogous decision to utilize in predicting how our Supreme Court would address the strict liability argument advanced by the plaintiff. Godfrey involved two students who sued their seminary alleging they

III.

We review motions to dismiss de novo. Castello v. Wohler, 446 N.J. Super. 1, 14 (App. Div. 2016). When considering an application for relief under Rule 4:6-2(e), a court is required to search "the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746

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had been sexually harassed by a man who often attended the seminary's events. Yucis, 813 Fed. Appx. at 784 (citing Godfrey, 196 N.J. at 182). The Yucis court noted:

> The New Jersey Supreme Court applied the "severe-or-pervasive" standard for hostile-work-environment claims in the employment-discrimination context even though that case was brought under the public-accommodations provision of the LAD. [Godfrey, 196 N.J. at 196.] And the Court further noted that the "means employed by an institution to deter harassment . . . may be considered when assessing that institution's vicarious liability for the actions of an individual over whom the institution exercises control." [Id. at 200.] This statement from the New Jersey Supreme Court . . . persuade[s] us that the New Jersey Supreme Court, if confronted with the issue, would apply the agency principles discussed in Lehmann—those set out in Restatement § 219—in public-accommodations harassment cases under the LAD.
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> [Yucis, 813 Fed. Appx. at 785.]

(1989) (quoting DiCristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). In so doing, a court must "assume the facts as asserted by [a] plaintiff are true and give [the plaintiff] the benefit of all inferences that may be drawn in [plaintiff's] favor." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). If the complaint states no basis for relief and discovery would not provide one, dismissal is the appropriate remedy. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005).

N.J.S.A. 10:5-4 recognizes as a civil right the opportunity "to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of . . . sexual orientation[.]" To protect that right, N.J.S.A. 10:5-12f(1) declares it to be unlawful discrimination for

> any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof . . . on account of . . . sexual orientation . . . of such person[.]

N.J.S.A. 10:5-5l defines a "place of public accommodation" to include a "retail shop, store, establishment, or concession dealing with goods or services of any

kind." The parties do not dispute Elements Massage is a place of public accommodation to which the LAD applies.

We noted in Turner, "the focal issue [in a public accommodation discrimination case] is whether defendant acted with an actual or apparent design to discourage present or future use of the public accommodation by plaintiff on account of her protected status." 363 N.J. Super. at 213. Moreover, the "LAD is not limited to outright denial of access or service. . . . [I]t also renders unlawful any acts discriminating against any person in the furnishing of the public accommodation. N.J.S.A. 10:5-12(f)(1)." Id. at 212.

Guided by these principles, we address whether an employer should be strictly liable for the conduct of an employee under the facts in this case. Plaintiff contends the plain meaning of the statute requires us to apply a strict liability standard concerning the conduct of employees.[6] We decline to read N.J.S.A. 10:5-12(f)(1) as imposing strict liability on an employer. Although employees are liable for acts of discrimination pursuant to N.J.S.A. 10:5-12f(1), the statute does not state employers are strictly liable for the conduct of employees in the public accommodation context. Moreover, our Supreme Court

[6] Middleton is not a named defendant in this case. Plaintiff only named her employers as defendants in this matter.

has never determined employers are strictly liable for an employee's public accommodation discrimination. Plaintiff has provided no controlling authority to hold employers strictly liable for the conduct of their employees, and we find no basis to hold employers strictly liable for employee conduct under these circumstances. In fact, the Supreme Court has determined—in a hostile work environment case involving sexual harassment by supervisors—employers are not strictly liable under the LAD for the conduct of employees. Aguas v. State, 220 N.J. 494, 511 (2015). We also hold that strict liability should not be applied in the public accommodation context.

We determine the better approach is to utilize agency principles—not strict liability—when addressing an establishment's liability for an employee's conduct as discussed in Lehman. 132 N.J. at 593. Although Lehmann involved a supervisory hostile work environment claim for sexual harassment, we conclude the use of agency principles strikes the proper balance in evaluating employer liability for employee conduct in public accommodation cases. The Lehmann Court noted, "[w]e are satisfied that agency principles are sufficiently well-established to provide employers with notice of their potential liability and also sufficiently flexible to provide just results in the great variety of factual

circumstances . . . ." Id. at 619. We are also persuaded this is a sound approach in public accommodation discrimination cases.

We conclude a trial court should analyze claims against employers stemming from employee public accommodation discrimination by utilizing § 219 of the Restatement (Second) of Agency, which provides:

> (1) A[n] [employer] is subject to liability for the torts of his [employee] committed while acting in the scope of their employment.
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> (2) A[n] [employer] is not subject to liability for the torts of his [employees] acting outside the scope of their employment, unless:
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> > (a) the [employer] intended the conduct or the consequences, or
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> > (b) the [employer] was negligent or reckless, or
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> > (c) the conduct violated a non-delegable duty of the [employer], or
> >
> > (d) the [employee] purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.
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> [Ibid.]

The trial court addressed these factors in dismissing plaintiff's complaint. We do not criticize the court's analysis based on the facts set forth in the

complaint. However, because the issue of whether a court should apply strict liability or agency principles in the context of an employee public accommodation case had not been previously addressed, we remand on the issue of plaintiff's entitlement to discovery. Plaintiff argues if we do not adopt a strict liability standard concerning employer liability for employee conduct in the context of public accommodation discrimination, he is entitled to conduct discovery to explore whether defendants are vicariously liable for Middleton's conduct. We agree.

The Court in Banco Popular noted, "[i]t bears repeating here that on a Rule 4:6-2(e) motion, the plaintiff must receive every reasonable inference, and 'the complaint must be searched in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken.'" 184 N.J. at 183 (emphasis in original) (citing Printing Mart-Morristown, 116 N.J. at 746). Here, plaintiff is entitled to discovery to determine if he can establish defendants' vicarious liability pursuant to § 219 of the Restatement (Second) of Agency. Moreover, with further discovery, the trial court will have a better record to assess the agency issue.

To the extent we have not otherwise addressed the parties' arguments, they lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed in part, vacated in part, and remanded for discovery.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION