

**STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF PUBLIC HEARINGS**

Commission on Human Rights &
Opportunities ex rel. Dennis Perri,
Complainant

CHRO No. 0750113
Fed No. 16aa

v.

George Peluso,
Respondent

January 11, 2008

Ruling on Commission's Motion to Strike
Second Affirmative Defense

On November 23, 2007, the commission on human rights and opportunities (CHRO or commission) filed a motion to strike the respondent's second affirmative defense to the pending complaint filed by the complainant. The special defense that is sought to be stricken reads as follows:

2. Complaint regarding flashing light door bell should be dismissed because pursuant to CHRO procedures, respondent made a written offer of settlement to allow the complainant to install the device. This offer was ignored by complainant.

Incorporated in the commission's motion was legal argument which supported its position to strike the subject special defense. The commission's claim for moving that the special defense be stricken is that it discloses settlement negotiations between the parties which "violates the strong public policy of promoting settlement of disputes. See generally *Tomasso Brothers, Inc. v. October Twenty-Four, Inc.*, 221 Conn. 194, 198 (1992); *Jutkowitz v. Department of Health Services*, 220 Conn. 86, 98 (1991)."

In an apparent effort to offer some clarity to the referenced settlement offer, the commission discloses that respondent's offer of a reasonable accommodation (an apparent reference to the offer of settlement) was made during the investigation of the pending complaint. Finally, the commission points out that not only was the respondent's offer of settlement made while he pursuing a summary process action against the complainant but it was conditional on the complainant withdrawing his CHRO complaint.

Additionally, the commission advances the argument that the presiding referee is prohibited from receiving evidence of negotiations for conciliation pursuant to General Statutes § 46a-84(e).

The respondent after having sought and received additional time to respond to the commission's motion filed its objection to the motion to strike on December 14, 2007. The respondent's objection while at best brief and without citing to any authority argued that the offer of settlement was not a privileged communication.

On December 17, 2007 the complainant filed his response to the respondent's objection referencing for the first time Regulation of Connecticut State Agencies § 46a-54-67a (f) (1) (D) (iii) that states: "A complaint may be dismissed for the following reasons, the complainant refuses an offer of full relief in which the respondent, has offered to the complainant full relief as determined by the nature of the claims." In addition, the complainant appended to his response a letter dated March 22, 2007 details an offer of

settlement and which again is not alleged or referenced in any other pleading including (and more importantly) the second special defense which is the subject of the pending motion to strike.

The commission on December 17, 2007 responded to the respondent's objection. The commission argues that the letter of settlement was dated prior to the certification to public hearing and as such is not part of the public hearing file available to the presiding referee. Furthermore, the letter was not a make whole relief offer and would not bring into play an administrative dismissal pursuant to state regulation or statute.

For the following reasons the commission's motion to strike is DENIED.

"[W]henver any party wishes to contest ...the legal sufficiency of any answer to any complaint... or any part of that answer including any special defense contained therein, that party may do so by filing a motion to strike the contested pleading or part thereof." *Young v. North Stonington Development Associates, LLC* 2007 WL 31256186 (quoting Practice Book §10-39(a)).

In ruling on a motion to strike this tribunal must accept the facts as alleged in the pleading being challenged. *Blancato v. Feldspar Corp.*, 203 Conn. 34 (1987). It must construe those facts most favorably to the non-moving party *Novamatrix Medical Systems, Inc. v. BOC Group, Inc.*, 224 Conn. 210 (1992). "[W]here the legal grounds for such a motion are dependent upon underlying facts not alleged in [respondent's

special defense] the [commission] must await the evidence which may be adduced at trial and the motion should be denied.” *Liljedahl Bros., Inc. v. Grigsby, et al.*, 215 Conn. 345, 348 (1990). This rule however does not require the denial of a motion to strike should a party allege a fact not contained in the subject pleading regardless of whether the fact is relevant to the argument advanced. *Id.* 349. In this instance I find the additional proffered facts to be relevant. Furthermore, I find that the commission’s argument is dependent on facts outside the special defense, e.g. the offer was made during the conciliation stage of the investigation; there was pending a summary process motion; and the offer of settlement was contingent on a withdrawal of the CHRO complaint.

The result of imparting new facts outside the subject pleading is a speaking motion and will not be granted, *Young et al. v. North Stonington Development Associates, LLC, et al.*, 2002 WL 31256186, quoting *Doe v. Marselle*, 38 Conn. App. 360, 364, rev’d on other grounds, 236 Conn. 845 (1996).

Despite the improper use of a speaking motion, were I to just rule on the whether it is proper to plead a potential offer of settlement as a means (presumably) to mitigate any potential award for damages, my ruling would not change and a denial would enter. The superior court though divided on this issue, has held it proper for a defendant to plead mitigation of damages as a special defense. (*Parson v. Sikorsky Aircraft Division*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. 280394 (July 2, 1998) (Melville, J.); *Buitekant v. Zotos Corp.*, Superior Court, judicial district of

Stamford-Norwalk at Stamford, Docket No. 135874 (February 20, 1996) (Kajazin, J.); *Kimball, et al. v. Timothy J. King Builder, Inc.*, 31 Conn. L. Rptr. 576, 2002 WL 523445 (Conn. Super).

Finally, were I to read the commission's motion as arguing that the special defense in question warrants being stricken as an effort to offer inadmissible evidence, this argument as well would bring the same ruling. "The admissibility of evidence is not properly raised on a motion to strike. The purpose of a motion to strike is to test the legal sufficiency of the pleadings. The admissibility of evidence goes to the proof of the facts pleaded not to their legal sufficiency." *New London Board of Education v. Hartford Fire Insurance*, 1994 WL 14518 (Conn. Super.).

The commission's motion to strike being an improper speaking motion, one which argued that the issue of settlement is both improper and inadmissible, I am denying it for reasons stated above.

It is so ordered this 11th day of January 2008.

Thomas C. Austin, Jr.
Presiding Human Rights Referee

cc.

Dennis Perri
George Peluso
Cecil J. Thomas, Esq.
Lisa Silverstri, Esq.
Kimberly Jacobsen, Esq.