

Francis v Eisenbeiss
2012 NY Slip Op 30208(U)
January 23, 2012
Sup Ct, NY County
Docket Number: 102777/11
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EMILY JANE GOODMAN

PRESENT: _____
Justice

PART 17

Index Number : 102777/2011
FRANCIS, JOYCE E.
vs.
EISENBEISS, CHRISTIAN
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

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

this motion to/for _____

PAPERS NUMBERED

1-5
6-7
8-9

Notice of Motion/ Order to Show Cause — Affidavits — exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided by the annexed*
Memorandum and Order

NB
PC @ 3/15/12
10:00AM

FILED

JAN 30 2012

Dated: 1/23/12

NEW YORK COUNTY CLERK'S OFFICE
EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
JOYCE E. FRANCIS,

Plaintiff,

-against-

CHRISTIAN EISENBEISS and CRE CAPITAL LLC,

Defendants.
-----X

Index No.: 102777/11

DECISION & ORDER

FILED

JAN 30 2012

Emily Jane Goodman, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Joyce E. Francis (Francis) sues defendants Christian Eisenbeiss (Eisenbeiss) and CRE Capital LLC. (CRE Capital) (together, Defendants) for retaliatory firing and race and age discrimination under the Family Medical Leave Act (FMLA) (29 USC 2617), the Americans with Disabilities Act (ADA) (42 USC 12111), the Age Discrimination in Employment Act (ADEA) (29 USC 630), the Civil Rights Act of 1964 (42 USC 1983), and the New York State Human Rights Law (NYSHRL) (NY Executive Law § 292). Defendants move to dismiss on the grounds of documentary evidence (CPLR 3211[a][1]) and that the complaint fails to state valid causes of action (CPLR 3211[a][7]). The motion is decided as follows.

Ms. Francis is an African-American woman over the age of fifty (Complaint, ¶ 90). In October 2006, she was hired by Eisenbeiss; her duties included maintaining Eisenbeiss's house in Pine Plains, New York and running errands, among other things. In 2007, Eisenbeiss formed CRE Capital, and began paying Ms.

Francis from the company funds (she was listed as an employee of CRE Capital on its NY-45-MN quarterly reports [attached to Eisenbeiss Aff., Ex. B]). According to Eisenbeiss, CRE Capital never had more than 3 employees (Eisenbeiss Aff., ¶ 3).

In July 2008, Ms. Francis alleges that, while at work, she fell and suffered an injury. She asked for time to recover, and was granted it, with pay (Complaint, ¶ 18-19). During that time, CRE Capital hired Dale Boyles (Boyles), a younger Caucasian woman, to take over the housekeeping duties at the Pine Plains residence. Ms. Francis avers that after her injury, she was unable to use her hand, and could not do all the work required of her position (Francis Aff. ¶ 10, attached to Barran Aff, Ex. A). Francis was paid until May 22, 2009, when she was terminated. Boyles continued to work for CRE Capital. Ms. Francis filed a complaint of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC), which granted her a right to sue. This action followed.

Defendants argue that 42 USC 1983 is inapplicable because neither Eisenbeiss or CRE Capital are state actors, nor did they act under color of law (see *Ciambriello v. County of Nassau*, 292 F3d 307, 323 [2nd Cir 2002]). Defendants are not state actors, nor is it alleged that, in terminating Ms. Francis, the Defendants acted under the color of law.

Next, Defendants argue that they are not "employers"

[*4]

under the statutes listed in the complaint. Under the majority of the statutes raised here, Defendants are correct. An entity must employ at least 15 workers to qualify as an "employer" under the ADA (42 USC 12111[5] [A]), 20 under the ADEA (29 USC 630[b]), and 50 under the FMLA (29 USC 2611[4] [A] [I]). Ms. Francis argues that Eisenbeiss should be considered as an employer under each of these statutes because he either owns or is involved in other companies--not parties here--that may have enough workers to satisfy the statutory requirements, and that CRE Capital actually employs over 100 people (Francis Aff., attached to Barran Aff., Ex. A, ¶ 2). This argument is unpersuasive. There is no evidence that CRE Capital employed 100 people, and this allegation is flatly contradicted by documentary evidence provided by Eisenbeiss (Eisenbeiss Aff., Ex. A) (*Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 233-34 [1st Dept 1994]). Similarly, beyond Eisenbeiss's alleged involvement, there is no connection alleged between CRE Capital and the several companies listed in opposition to the motion, such that they should be considered one company.

Defendants also argue that the NYSHRL cannot apply. Under the NYSHRL, "[t]he term 'employer' does not include any employer with fewer than four persons in his or her employ ..." (NY Executive Law § 292[5]). Eisenbeiss argues that he never employed more than three workers at CRE Capital. In support, he

* 5]

attaches his NYS-45-MN quarterly combined wage report forms from 2007-2009 (Eisenbeiss Aff., Ex. A). The Q4 quarterly report for 2008 lists four employees, Francis and three others, whose names are redacted. Accordingly, the documentary evidence does not establish as a matter of law that CRE Capital did not employ four or more employees. Thus, Executive Law § 292(5) does not preclude Ms. Francis from alleging causes of action brought under the NYSHRL.

Finally, Defendants argue that Ms. Francis does not have standing to bring an action under the NYSHRL because she is an exempted domestic worker.¹ Domestic Worker is defined in the New York Labor Law as "a person employed in a home or residence for the purpose of caring for a child, serving as a companion to a sick, convalescing or elderly person, housekeeping or for any other domestic service purpose" (New York Labor Law § 2[16]). However, Ms. Francis has stated that, beyond housekeeping, her duties included mail collection for CRE Capital, payment of bills for CRE Capital, banking, invoice reviews, and other duties. These actions, plus the fact that she was employed by a corporation, establishes that Ms. Frances was not a domestic worker as defined by the Labor Law. Accordingly, Ms. Francis is a protected worker under the NYSHRL and has alleged valid causes

¹ The new legislation found in NYSHRL 296(b), which provides domestic workers with certain rights under the NYSHRL, was not implemented at the time of Ms. Francis's termination.

of action under that statute.²

In light of the foregoing, it is hereby

ORDERED that the motion to dismiss of the defendants Christian Eisenbeiss and CRE Capital, LLC. is granted to the extent that the first, second, third, fourth, sixth, seventh and eighth causes of action are dismissed; the fifth and ninth causes of action, brought under the NYSHRL, survive; and it is further

ORDERED that the defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 422, 60 Centre Street, on March 15, 2012, at 10:00 AM.

THIS CONSTITUTES THE DECISION OF THE COURT

Dated: Jan 23, 2012

FILED

Enter: JAN 30 2012

NEW YORK COUNTY CLERK'S OFFICE

J.S.C.
EMILY JANE GOODMAN

² If, in fact, Ms. Francis was a domestic worker only, but was employed by defendants' financial company, that is a matter for the Internal Revenue Service and the Securities Exchange Commission.