Reyes v Brinks Global Servs. USA, Inc.
2012 NY Slip Op 30296(U)
January 20, 2012
Supreme Court, Queens County
Docket Number: 20272/2009
Judge: James J. Golia
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA IA Part 33
Justice

HUGH REYES, x . Plaintiff(s)	Index Number 20272 2009
- - against - -	Motion Date September 22, 2011
BRINKS GLOBAL SERVICES USA, INC., BRINKS, INC., AND JAMES MULLEN,	Motion Cal. Number 31
Defendant(s). x	Motion Seq. No. 5

The following papers numbered 1 to 17 read on this motion by defendants Brink's, Incorporated, improperly identified in the complaint as Brinks Global Services USA, Inc. and Brinks, Inc.(Brinks), and James Mullen for summary judgment pursuant to CPLR 3212 and on this cross motion by plaintiff Hugh Reyes for leave to file an amended complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-9
Notice of Cross Motion - Affidavits - Exhibits	10-12
Reply Affidavits	13-17

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This action arises out of the termination of plaintiff's employment as a security officer for defendant Brinks. The undisputed facts are as follows: Defendant Brinks is engaged in the business of providing security and safeguarding cash and other valuable property of its

customers. As part of its operations, defendant Brinks maintains a secure vaulting facility located at 184-45 147th Avenue, Springfield Gardens, New York, adjacent to John F. Kennedy International Airport (the "Facility"), to securely store the cash and valuable property of its customers. The Facility has a Turret, which is an enclosed room at the entrance to the Facility, where entry to and egress from the interior of the Facility is controlled. The Turret is staffed at all times by armed guards. Plaintiff was employed by defendant Brinks as a Building/Turret Guard at the Facility from April 24, 2006, through June 8, 2009. Defendant Mullen was the Director of Operations of defendant Brinks during this time period. When plaintiff was hired in 2006, he signed a written statement acknowledging that his employment was "at-will" and, as such, could be terminated by himself or defendant Brinks at any time without repercussions with or without cause.

As a Building/Turret Guard, plaintiff was responsible for monitoring and safeguarding the entry to and egress from the facility by both persons and vehicular traffic; conducting surveillance of the interior of the Facility by monitoring video from security cameras; activating the alarm in the event of an emergency alert condition, such as a break-in; answering telephone calls to the Facility, and, in general, overseeing the security of the Facility and safeguarding the cash and valuable property of Brinks' customers stored at the Facility.

On May 25, 2009 (Memorial Day), plaintiff was assigned to duty at the Turret commencing at 7:00 A.M. Plaintiff was the sole guard in the Turret, and at approximately 3:00 P.M. that day, plaintiff exited the Turret, leaving the Turret unattended and the Facility unoccupied. Plaintiff placed the interlocking doors from the Turret to the exterior on "bypass" and attempted to prop the exterior door open by placing a newspaper between the door and the door frame, to prevent the door from locking. Instead, the door closed securely and locked behind plaintiff locking him out of the Turret and Facility. Plaintiff could not regain entry and could not communicate with anyone about the lockout since he did not have his radio or phone on his person.

A videotape made that day in the ordinary course of defendant Brinks' business shows plaintiff's actions in attempting to prop open the exterior door of the Turret, the door closing securely behind him and his attempts to reopen it. The videotape also shows plaintiff lighting up a cigarette approximately 30 seconds later.

A Brinks' supervisor, Edgar Gonzalez, who lived nearby the facility, received a call that day at 5:00 P.M. from a secondary alarm company about a communications failure at the Facility. He attempted to reach the Turret by phone and receiving no response, contacted the Branch Manager, John Muhlenforth, and advised him he would go to the Facility to investigate the situation. When Gonzalez arrived at the Facility, he observed plaintiff and

another guard, Robert Wagner, who had arrived to relieve plaintiff, both locked out of the Facility. A locksmith was contacted to regain access to the Facility, which occurred approximately three hours after the lockout. During the lockout, none of the required security functions could be performed, including observation of video monitors for the security cameras showing other sections of the Facility, the answering of telephone calls, the monitoring of entry to and egress from the Facility and the monitoring of the alarm system.

Upon being advised of the lock-out incident, the Senior Vice President of Brinks, Ishay Zwickel, directed Brinks' Regional Security Manager, Nino Erazo, to investigate the incident. The investigation included a review of the Brinks' security camera videotape showing plaintiff's conduct and demeanor at the time of the lockout. Nino Erazo also spoke with Edgar Gonzalez, Robert Wagner and John Muhlenforth. Mr. Muhlenforth had spoken with plaintiff the following day and plaintiff told him he had felt dizzy and left the Turret to get some air. Mr. Muhlenforth had also spoken with and received a written statement from defendant Brinks' Office Coordinator, Jessie Guadamuz, who had been at the Facility to do the payroll and had spoken to plaintiff prior to the lock-out incident. According to Ms. Guadamuz, plaintiff informed her he would leave the Facility that day at 3:00 P.M., regardless of whether he was relieved of his guard duty.

Ishay Zwickel asked Nino Erazo what disciplinary actions he recommended be taken against plaintiff and Erazo responded in an email that plaintiff should be terminated for abandoning his post in violation of regulations. Thereafter, a consensus decision to terminate was reached by Ishay Zwickel, defendant Mullen, John Muhlenforth and Jo Ann Deloy, defendant Brinks' Manager for Human Resources. On June 8, 2009, Ishay Zwickel and John Muhlenforth met with plaintiff and advised him of his termination because of the lock-out incident. Plaintiff also was given written notice of and the reasons for termination. The notice referenced plaintiff's violation of Brinks' policies and procedures in leaving the Turret unattended and locking himself out on May 25, 2009, and the resulting compromise to the security of the Facility, to plaintiff's own safety and the safety of the security officer who was to relieve him, and to the liability (the cash and other valuables) maintained by Brinks in the Facility. Plaintiff signed the notice of termination "under protest."

Plaintiff thereafter commenced the instant action against defendant Brinks and its director of operations, defendant Mullen, alleging that his termination was not the product of legitimate business reasons, but of discrimination on the basis of race/color in violation of the New York State and New York City Human Rights Laws (Executive Law § 296; Administrative Code of City of New York § 8-101, et seq.), and wrongful retaliation against plaintiff in violation of the same statutory provisions.

Plaintiff alleges the following: In 2007, when defendant Mullen, who is white, became the director of operations, he began to harass plaintiff, who is black, and on one occasion he called plaintiff at the Turret and yelled at him to change a wire in the phone even though it was not plaintiff's responsibility. Defendant Mullen cursed at the black and the Hispanic employees, and on one occasion called an employee stupid. Defendant Mullen did not yell or curse at the white employees. The black and Hispanic guards worked in the Turret, and a white guard worked in the front office and was paid more. Plaintiff complained about defendant Mullen's harassment at a meeting with Human Resources in January of 2009, and to Ishay Zwickel in May of 2009, but no remedial action was taken. On the date of the lock-out incident, plaintiff's shift was to end at 3:00 P.M., but the guard to relieve him had not arrived. At approximately 3:15 P.M., plaintiff started getting sharp pains on the left side of his head, face and neck, and feeling dizzy and faint, so he propped open the Turret door with a newspaper and went outside for fresh air and a cigarette. Even though plaintiff's shift was over, he was written up for the lock-out incident because of his race/color by John Muhlenforth, a white supervisor. Plaintiff thereafter was terminated from employment on June 8, 2009, on the basis of his race/color and in retaliation for his complaints of race/color harassment.

Defendants Brinks and Mullen move for summary judgment and plaintiff cross-moves for leave to amend his complaint to allege disability discrimination and hostile work environment.

Leave to amend a pleading shall be freely given in the absence of prejudice or surprise resulting from the delay, and provided that the proposed amendment is not palpably insufficient as a matter of law or totally devoid of merit. (*See* CPLR 3025[b]; see also *Edenwald Contracting Co., Inc. v City of New York*, 60 NY2d 957 [1983]; *AYW Networks, Inc. v Teleport Communications Group, Inc.*, 309 AD2d 724 [2003].) The determination as to whether to grant such leave is within the motion court's sound discretion, the exercise of which will not be lightly disturbed. (*See Pergament v Roach*, 41 AD3d 569 [2007]; *see also Young v A. Holly Patterson Geriatric Center*, 17 AD3d 667 [2005]; *Sewkarran v DeBellis*, 11 AD3d 445 [2004].)

In this case, although plaintiff failed to provide copies of his proposed amended complaint with his initial cross motion papers (*see Chang v First American Title Insurance Co.*, 20 AD3d 502 [2005]; *see also Ferdinand v Crecca & Blair*, 5 AD3d 538 [2004]; *Haller v Lopane*, 305 AD2d 370 [2003]), the court will consider the proposed amended complaint submitted in reply. There has been gross delay by plaintiff in asserting the proposed amendments, two years after commencement of his action and six months after the filing of a note of issue. The alleged facts and circumstances upon which these amendments are based were known to plaintiff at the time he filed his original complaint. Defendants, who have

prepared their defense in response to plaintiff's original complaint, would be prejudiced by the addition of the proposed amendments at this late time. (*See Surgical Design Corp. v Correa*, 31 AD3d 744 [2006]; *see also Voyticky v Duffy*, 19 AD3d 685 [2005]; *Young v A. Holly Patterson Geriatric Center*, *supra*.) Moreover, plaintiff fails to sufficiently plead causes of action for disability discrimination and hostile work environment, and these proposed amendments are patently lacking in merit. (*See Ross v Gidwani*, 47 AD3d 912 [2008]; *see also Hill v 2016 Realty Associates*, 42 AD3d 432 [2007]; *Perrini v City of New York*, 262 AD2d 541 [1999].)

Accordingly, plaintiff's cross motion for leave to file an amended complaint is denied.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing an entitlement to judgment as a matter of law. (*See Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985].) Once the requisite showing has been made, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a triable issue of fact. (*See Giuffrida v Citibank Corp.*, *supra*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, *supra*.)

To establish entitlement to judgment as a matter of law in a case alleging discrimination, the defendants must demonstrate either plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual. (*See Michno v New York Hosp. Med. Ctr. of Queens*, 71 AD3d 746 [2010]; *Apiado v North Shore Univ. Hosp.[At Syosset]*, 66 AD3d 929 [2009]; *DeFrancis v North Shore Plainview Hosp.*, 52 AD3d 562 [2008].)

In this case, defendants established, prima facie, that plaintiff's employment was terminated for legitimate, nondiscriminatory reasons, that is, the lock-out incident and plaintiff's abandonment of his post in violation of Brinks' policies, and not as retaliation. In response, the plaintiff failed to raise a triable issue of fact as to whether the defendants' proffered reasons for termination were merely a pretext for racially-motivated discrimination (see *Apiado v North Shore Univ. Hosp. [At Syosset]*, *supra*; *see also Morse v Cowtan & Tout, Inc.*, 41 AD3d 563 [2007]; *Cesar v Highland Care Ctr, Inc.*, 37 AD3d 393 [2007]), or unlawful retaliation. (*Id.*)

Plaintiff's assertion that additional discovery is necessary is no more than a mere hope that disclosure will reveal something helpful to defeat the motion, and insufficient to forestall summary judgment. (*See Commissioners of the State Insurance Fund v Concord Messenger*

Service, Inc., 34 AD3d 355 [2006]; *see also Fulton v Allstate Ins. Co.*, 14 AD3d 380 [2005]; *Kennerly v Campbell Chain Co.*, 133 AD2d 669 [1987].)

Accordingly, the motion of defendants Brinks and Mullen for summary judgment is granted and plaintiff's complaint is dismissed.

This constitutes the Order of the Court.

Dated: January 20, 2012

James J. Golia, J.S.C.