

Allen v Riese Org. Inc.
2012 NY Slip Op 33187(U)
June 15, 2012
Supreme Court, New York County
Docket Number: 113570/11
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. JOAN A. MADDEN PART 11

Justice

WALTER ALLEN and TOMAS PEREZ,

Plaintiffs,

INDEX NO. 113570/11

MOTION DATE: 6-14-12

- v -

THE RIESE ORGANIZATION INC., A.R.O.
CONSTRUCTION CORP., DENNIS
RIESE, GARY TRIMARCHI, and
ELIO MARTINI,

MOTION SEQ. NO.: 001

Defendants.

The following papers, numbered 1 to _____ were read on this motion to _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
FILED
JUN 29 2012
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: [] Yes [x] No

Defendants move pursuant to CPLR 3211(a)(1)(5) and (7) for an order (i) dismissing the claims of plaintiffs with prejudice on the grounds that plaintiffs each executed a release, and (ii) dismissing the claim for the intentional infliction of emotional distress asserted against defendant Elio Martini ("Martini") on the grounds that it is barred by the one-year statute of limitations, and (iii) awarding attorneys' fees and sanctions against plaintiffs. Plaintiffs oppose the motion, which is granted in part and denied in part.

In this action, plaintiffs, former employees of defendant A.R.O. Construction Corp. ("ARO"), who worked in the construction trade, allege that they were wrongfully discharged in January 2009. The complaint asserts causes of action against all the defendants for discrimination based on race, retaliation, hostile work place in violation of New York State Human Rights Law and New York City's Administrative Code, and against defendant Elio

Martini ("Martini") for the intentional infliction of emotional distress.

Defendants now move to dismiss the complaint based on a Severance Agreement and Release signed by each of the defendants at the time they were terminated in January 2009 ("the Agreements"). In support of the motion, defendants submit copies of the Agreements under which, in exchange for a severance payment equivalent to two weeks pay, each plaintiff agreed to release defendants from "liability arising pursuant to any employment relations statute including..the New York State Human Rights Law and the New York City Administrative Code...and [for] mental and emotional distress." Defendants also argue that the claim for the intentional infliction of emotional distress is barred by the applicable one-year statute of limitations.

Plaintiffs oppose the motion, asserting that, at the very least, there are factual questions as to whether the Agreements are enforceable given the circumstances under which they were signed. In support of their opposition, each plaintiff submits his affidavit. Plaintiff Tomas Perez ("Perez") states that he does not understand English well and the Agreement was in English and no attempt was made to explain the contents to him in Spanish. In addition, both Perez and plaintiff Walter Allen ("Allen") state that defendant Martini told them if they did not sign the Agreement his company would block all unemployment benefits by accusing them of misconduct, even though they were told they were being laid off for economic reasons.

According to the affidavit of Angelo Colleo ("Colleo"), who was a former supervisor of Perez and Allen, he acted as a Spanish translator for Perez when Martini informed him that he was being terminated, and was present when Perez was given a copy of the Agreement. Colleo states that Perez was given a copy of the Agreement in English only and that he was not asked to translate any of the terms of the document for Perez. Colleo also states that both Perez and Allen were told that if they did not sign the Agreements they would be accused of misconduct and lose their unemployment benefits.

On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint must be terminated liberally construed in the light most favorable to the plaintiff, and

all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference” Morgenthau & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1st Dept 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999), aff’d, 94 NY2d 659 (2000). In such cases, “the criterion becomes ‘whether the proponent has a cause of action, not whether he has stated one.’” Id., quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. However, dismissal based on documentary evidence may result “only where ‘it has been shown that a material fact as claimed by the pleader...is not a fact at all and ... no significant dispute exists regarding it.’” Acquista v. New York Life Ins. Co., 285 AD2d 73, 76 (1st Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275.

“[I]t is firmly established that a valid release which is clear and unambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between parties.” Skluth v. United Merchants & Mfrs., Inc., 163 AD2d 104, 106 (1st Dept 1990)(internal quotation omitted). However, factual questions as to the validity of a release of discrimination claims have been found based on allegations of “‘overreaching or unfair circumstances’ which if provided would render enforcement of the release inequitable.” Johnson v. Lebanese American University, 84 AD3d 427, 431 (1st Dept 2011), quoting, Mangini v. McClurg, 24 NY2d 556, 567 (1969). These include circumstances when a “plaintiff is given the take-it-or-leave-it proposition of signing the document or not receiving any payment,” Id.

Here, the affidavits submitted by plaintiffs raise issues of fact as to the validity of the Agreements not only with respect to whether they are products of overreaching, but also as to whether the releases were signed as the result of duress, illegality or fraud, in light of evidence that plaintiffs were threatened with loss of unemployment benefits based on false charges of misconduct if they did not sign the Agreements. See Mangini v. McClurg, 24 NY2d at 567; Lopez v. 121 St. Nicholas Ave H.D.F.C., 28 AD3d 429 (2d Dept 2006)(finding that the record

raised triable issues of fact as to whether release was the result of duress, illegality and fraud or mutual mistake where plaintiff was allegedly told he would be fired and reported to immigration authorities if he did not sign release). Accordingly, the motion to dismiss the complaint based on the release contained in the Agreements is denied.

Nor is defendants' argument that duress is not pleaded meritorious. While a properly asserted defense of release may shift the burden going forward, defendants fail to cite any legal support for their argument that plaintiffs must plead duress and, in particular, that the lack of such assertion mandates dismissal of a complaint on a pre-answer motion.

As for the fourth cause of action, for the intentional infliction of emotional distress, it is dismissed as barred by the applicable one-year statute of limitations. See Bridges v. Wagner, 80 AD3d 528 (1st Dept 2011). The events underlying this claim occurred, at the latest, in January 2009, when plaintiffs were terminated, and this action was not commenced until more than two years later in December 2011.

In view of the above, it is

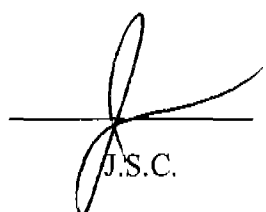
ORDERED that the motion to dismiss the complaint is granted only to the extent of dismissing the fourth cause of action for the intentional infliction of emotional distress as barred by the statute of limitations; and it is further

ORDERED that defendants shall file an answer to the complaint within 30 days of this decision and order; and it is further

ORDERED that defendants' request for attorney's fees and sanctions is denied; and it is further

ORDERED that a preliminary conference shall be held in Part 11, room 351, 60 Centre Street, on August 16, 2012, at 9:30 am.

DATED: June 5, 2012


J.S.C.

FILED

JUN 29 2012

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Check one: FINAL DISPOSITION NON-FINAL DISPOSITION