

**Sarmiento v Ampex Casting Corp.**

2017 NY Slip Op 31702(U)

August 14, 2017

Supreme Court, New York County

Docket Number: 150294/2011

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

-----X  
ELSA SARMIENTO,

Plaintiff,

Index No.  
150294/2011

Decision and  
Order

- against -

Mot. Seq. 005

AMPEX CASTING CORPORATION AND  
JOSEPH IPEK,

Defendants.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Elsa Sarmiento ("Plaintiff"), a former employee of defendant, Ampex Casting Corporation ("Ampex"), from September 18, 1991 to February 18, 2010, brings this action against the defendants alleging unlawful discrimination and harassment based upon sex and retaliation under the New York State Human Rights Law, N.Y. Exec. Law 290 et. seq. (the "NYSHRL") and the New York City Human Rights Law, N.Y.C. Admin. Code 8-101, et. seq. (the "NYCHRL"). Defendant, Joseph Ipek ("Ipek"), is alleged to be Ampex's President and Plaintiff's supervisor during her employment at Ampex.

On March 6, 2015, defendants Ampex and Ipek (collectively, "Defendants") served Plaintiff, with a letter sent via certified mail and dated March 6, 2015 with a demand, pursuant to CPLR 3216(b)(3), that Plaintiff "resume prosecution of this action, and serve and file a note of issue within ninety (90) days of your receipt of this demand." Plaintiff did not file a note of issue. Plaintiff responded to Defendants' letter and enclosed a Notice of Deposition for Ipek.

Settlement discussions between the parties ensued from April 8, 2015 until May 2015. On May 14, 2015, Plaintiff filed a Request for a Preliminary Conference.

By Notice of Motion filed on August 28, 2015, Defendants moved to dismiss the action pursuant to CPLR § 3216, dismissing Plaintiff's Complaint for failure to proceed in the prosecution of this action and to resume prosecution with 90 days

after being served with a written demand pursuant to CPLR 3216(b)(3). Plaintiff opposed the motion. Plaintiff submitted, *inter alia*, the affirmation of Plaintiff's counsel Patrick Boyd, and an affidavit of merits from Plaintiff. The return date of the motion was October 2, 2015.

After the submission of Defendants' motion to dismiss and Plaintiffs' opposition to Defendants' motion, a Preliminary Conference was held on October 20, 2015. At the Preliminary Conference on October 20, 2015, the parties entered into an Order setting a discovery schedule. The parties scheduled another compliance conference on April 26, 2016. Plaintiff was to file a note of issue on or before May 26, 2016.

On December 23, 2015, the Court denied Defendants' motion to dismiss this action pursuant to CPLR 3216 and directed the parties to comply with the discovery schedule set forth in the October 20, 2015 Preliminary Conference Order.

On January 1, 2016, Defendants filed a motion seeking an Order, pursuant to CPLR 3124 and 3126, compelling Plaintiff to produce authorizations for the release of Plaintiff's medical records. Plaintiff opposed the motion. By Order dated March 24, 2016, the action was transferred to Trial Support for reassignment and subsequently assigned to Justice Bluth. By Order dated May 16, 2016, Justice Bluth granted Defendants' motion and directed Plaintiff to provide authorizations for certain designated medical providers by July 12, 2016.

On November 1, 2016, the parties entered into a Stipulation which addressed outstanding discovery. Subsequently, Plaintiff's deposition was held on April 13, 2017, April 14, 2017, and April 21, 2017. On May 2, 2017, the parties appeared for a compliance conference and an Order was entered which addressed outstanding discovery.

By Notice of Motion filed on May 15, 2017, Defendants move pursuant to CPLR 2221(3) to renew Defendants' motion to dismiss that they had previously brought on August 28, 2015 which was denied by the Court by order dated December 23, 2015. The basis for Defendants' motion to renew "rests upon newly discovery evidence uncovered throughout the course of depositions, the plaintiff's attorneys falsified the required affidavit of merits submitted in opposition to defendants' motion to dismiss" and "[t]he factual allegations underlying this action, by plaintiff's own admission, were false and inaccurate." Defendants argue that "plaintiff's attorneys appear to have simply taken the allegations of the unverified complaint, copied them verbatim into an affidavit, and affixed a falsely notarized signature page

to the back.” Defendants argue, “[S]ince the affidavit of merit was fraudulently obtained and submitted to the court under false pretenses, defendants’ motion to dismiss for failure to prosecute should have been granted when filed and the action should have been dismissed.”

Defendants submit the deposition testimony of Plaintiff, where she testified that she did not review the affidavit of merits after it was filed, she didn’t know that it was filed, she did not understand the purpose of the affidavit, and she did not remember signing the affidavit. Defendants also submit deposition testimony where Plaintiff denies having made certain allegations that are contained in her complaint and affidavit – specifically, those allegations that she was attacked or threatened by a group of co-workers with knives. At her deposition, Plaintiff testified that her allegation is that her co-worker Louisa Hernandez attacked her – and not a group of her former co-workers. (April 21, 2017 deposition, p. 467-468).

In opposition, Plaintiff argues that Defendants’ motion to renew is legally insufficient. Plaintiff argues, “First, it reasserts that Plaintiff has failed to prosecute this action when depositions were taken just weeks ago and the parties were before this Court just weeks ago receiving discovery directives and deadlines.” Plaintiff further alleges, “Second, it is based upon misleading excerpts of Plaintiff’s incomplete deposition testimony, which has been elicited through a Spanish interpreter, regarding events which occurred more than seven (7) years ago.” Plaintiff submits, *inter alia*, the affidavits of William Li and Russell E. Adler. Li attests, “I recall Ms. Sarmiento coming into our office on or about September 25, 2015 and have Russell E. Adler, Esq. (“Mr. Adler”), Of Counsel of BLG at the time and also a notary, notarized her affidavit of merit.” Mr. Adler attests, “I recall briefly meeting Ms. Sarmiento for the limited purpose of notarizing her signature. To the best of my recollection, that was the only time I met with or spoke to Ms. Sarmiento. I reviewed Ms. Sarmiento’s affidavit and can confirm that it was notarized by me on September 25, 2015.”

CPLR §2221(e) provides that leave to renew must be identified as such, and may be granted by a court where there are “new facts not offered on the prior motion that would change the prior determination,” provided that the movant provide “reasonable justification for the failure to present such facts on the prior motion.”

If a party is served with a 90-day demand pursuant to CPLR 3216(b)(3), and fails to serve and file a note of issue within the prescribed time period, the court may dismiss the party's claims, unless the party can demonstrate (1) a “justifiable excuse for the delay” and (2) a “good and meritorious cause of action” (CPLR 3216[e]).

"[T]he party seeking to avoid dismissal must still demonstrate a meritorious cause of action by an affidavit from someone with personal knowledge of the facts." (*Pub. Serv. Mut. Ins. Co. v. Zucker*, 225 A.D. 3d 308, 309 [1st Dept 1999]).

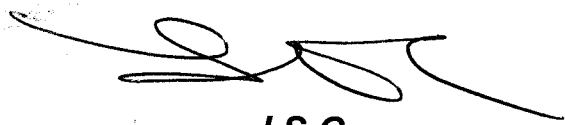
Here, discovery is proceeding in an active and meaningful way and Plaintiff's claims shall be adjudicated on the merits.

Wherefore, it is hereby

ORDERED that Defendants' motion to dismiss upon renewal is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: AUGUST 14, 2017



J.S.C.

HON. EILEEN A. RAKOWER  
X NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE