

Green v Verizon N.Y., Inc.

2012 NY Slip Op 33124(U)

December 6, 2012

Sup Ct, NY County

Docket Number: 108003/2010

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____
Justice

PART 46

Index Number : 108003/2010

GREEN, TAMIKA

VS.

VERIZON NEW YORK, INC.

SEQUENCE NUMBER : 002

DISMISS

FILED

JAN 14 2013

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for Dismiss the complaint

Notice of Motion/ Order to Show Cause NEW YORK Affidavits Exhibits ...
 Answering Affidavits — Exhibits COUNTY CLERKS OFFICE

Replying Affidavits _____

PAPERS NUMBERED
<u>1-2</u>
<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered ~~that this motion~~ and adjudged that:

The court grants plaintiff's motion to amend her complaint, grants defendants' motion to dismiss the Third Amended Complaint in part, and otherwise denies defendants' motion, pursuant to the accompanying decision. (C.P.L.R. §§ 3025(b), 3211(a)(7)).

Dated: 12/6/12

Lucy Billings
 LUCY BILLINGS J.S.C.

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 46

-----X

TAMIKA GREEN,

Index No. 108003/2010

Plaintiff

- against -

VERIZON NEW YORK, INC., MARGARET
BRADLEY, individually, and KAREN EVANS,
individually,

Defendants

FILED
DECISION AND ORDER
JAN 14 2013
NEW YORK
COUNTY CLERK'S OFFICE

-----X

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff, an employee of defendant Verizon New York, Inc.,
sues defendants for retaliating against her after she complained
about defendants' alleged unlawful disclosure of customer
information. Plaintiff also sues for discrimination based on
race, sex, and disability. Defendants move to dismiss her Second
Amended Complaint based on its failure to state a claim.
C.P.L.R. § 3211(a)(7). Plaintiff cross-moves to amend her
complaint again, to add an allegation that defendants' unlawful
disclosure of customer information posed specific dangers to the
public. C.P.L.R. § 3025(b).

II. PLAINTIFF'S MOTION TO AMEND HER COMPLAINT

A. STANDARDS FOR AMENDING THE COMPLAINT

C.P.L.R. § 3025(b) permits amendments to a complaint as long
as the they do not unfairly surprise or otherwise substantially
prejudice defendants, Kocourek v. Booz Allen Hamilton Inc., 85

A.D.3d 502, 504 (1st Dep't 2011); Jacobson v McNeil Consumer & Specialty Pharms., 68 A.D.3d 652, 655 (1st Dep't 2009); Thompson v. Cooper, 24 A.D.3d 203, 205 (1st Dep't 2005); Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d 352, 354-55 (1st Dep't 2005), and the proposed claims, as alleged, are meritorious. Sabo v. Alan B. Brill, P.C., 25 A.D.3d 420, 421 (1st Dep't 2006); Thompson v. Cooper, 24 A.D.3d at 205; Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d 352, 355 (1st Dep't 2005); Watts v. Wing, 308 A.D.2d 391, 392 (1st Dep't 2003). Plaintiff bears the burden to demonstrate her proposed claims' merit through admissible evidence. Hoppe v. Board of Directors of 51-78 Owners Corp., 49 A.D.3d 477 (1st Dep't 2008); Nathanson v. Tri-State Constr. LLC, 48 A.D.3d 373, 374 (1st Dep't 2008); Robinson v. Canniff, 22 A.D.3d 219, 220 (1st Dep't 2005); Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 355.

B. PREJUDICE

The proposed Third Amended Complaint will not prejudice defendants because they were well aware of the additional claims from the current version of the complaint. Based on the allegations in the current, Second Amended Complaint alone, which must be accepted as true for purposes of the pending motions, defendants were already aware of the unlawful acts and harms alleged by plaintiff, precisely because she complained of them to defendants. Kocourek v. Booz Allen Hamilton Inc., 85 A.D.3d at 504; Jacobson v. McNeil Consumer & Specialty Pharms., 68 A.D.3d at 655; Thompson v. Cooper, 24 A.D.3d at 205; Zaid Theatre Corp.

v. Sona Realty Co., 18 A.D.3d at 354-55.

C. THE PROPOSED CLAIM'S MERITS

1. The Elements of the Claim

Plaintiff's proposed Verified Third Amended Complaint alleges that the release of information posed a laundry list of potential harms "such as identity theft, assault, larceny and credit card fraud." Aff. of Stephanos Zannikos (Apr. 29, 2011) Ex. A ¶ 24. By alleging a risk of assault, plaintiff sets forth a physical harm that is more than mere financial harm or breach of protocol and thus sustains a claim under New York Labor Law § 740. See Remba v. Federation Empl. & Guidance Serv., 76 N.Y.2d 801, 802 (1990); Susman v. Commerzbank Capital Mkts. Corp., 95 A.D.3d 589, 590 (1st Dep't 2012); Katz v. Quality Bldg. Servs., 81 A.D.3d 558, 559 (1st Dep't 2011).

Although defendants' actions as alleged by plaintiff would not violate all the laws plaintiff cites, the alleged disclosure does violate New York Penal Law § 250.25(4) because defendants did, without their customers' permission, "knowingly divulge to another person the content or nature . . . of a telephonic or telegraphic communication." Plaintiff also alleges that defendants violated 47 U.S.C. § 222(c)(1) by failing to protect the confidentiality of customer proprietary network information as defined in § 222(h)(1). Exceptions to these statutory provisions for disclosure of known criminal transactions, N.Y. Penal Law §§ 250.25(4), 250.35, or disclosure otherwise required by law, 47 U.S.C. § 222(c)(1), do not apply here precisely

because plaintiff alleges that defendants disclosed customer information that was unrelated to a criminal transaction and that was not requested or was beyond the scope requested by subpoena and thus not required by law.

2. Statute of Limitations

Plaintiff commenced this action June 17, 2010. She alleges retaliatory actions by defendants after June 17, 2009, within the one year statute of limitations. N.Y. Labor Law § 740(4)(a). Many if not all the retaliatory actions alleged by plaintiff after June 17, 2009, are more than mere consequences of defendants' earlier acts, but are discrete, new hostile acts. For example, plaintiff alleges that before June 17, 2009, defendants imposed new scheduling requirements on her. She then alleges not merely that those scheduling requirements remained in place or that she was marked late for failing to abide by the schedule after June 17, 2009, but rather that defendants falsely marked her late in retaliation for her complaints. Her claims did not accrue only upon defendants' earlier retaliatory acts, but instead formed a continuing pattern of retaliation toward plaintiff, from which the limitations period continued to run. Dobson v. Loos, 277 A.D.2d 1013 (4th Dep't 2000). See Donas v. City of New York, 62 A.D.3d 504, 505 (1st Dep't 2009). Therefore the court grants plaintiff's cross-motion to amend her complaint.

III. DEFENDANTS' MOTION TO DISMISS THE COMPLAINT AS AMENDED

A. APPLICABLE STANDARDS

Upon defendants' motion to dismiss claims pursuant to C.P.L.R. § 3211(a)(7), the court may not rely on facts alleged by defendants to defeat the claims unless the evidence demonstrates the absence of any significant dispute regarding those facts and completely negates the allegations against defendants. Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). See C.P.L.R. § 3211(a)(1); Greenapple v. Capital One, N.A., 92 A.D.3d 548, 550 (1st Dep't 2012); Correa v. Orient-Express Hotels, Inc., 84 A.D.3d 650 (1st Dep't 2011); McCully v. Jersey Partners, Inc., 60 A.D.3d 562 (1st Dep't 2009). The court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiff's favor. Walton v. New York State Dept. of Correctional Services, 13 N.Y.3d 475, 484 (2009); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Wadiak v. Pond Management, LLC, ___ A.D.3d ___, 955 N.Y.S.2d 51, 52 (1st Dep't 2012). In short, the court may dismiss a claim based on C.P.L.R. § 3211(a)(7) only if the allegations completely fail to state a claim. Nonnon v. City of New York, 9 N.Y.3d at 827; Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010).

B. PLAINTIFF'S LABOR LAW AND HUMAN RIGHTS LAW CLAIMS

For the same reasons the court accepts plaintiff's Third Amended Complaint, plaintiff states a claim against defendants for violation of Labor Law § 740. The court therefore denies defendants' motion to the extent that the motion seeks to dismiss plaintiff's claim under Labor Law § 740.

Plaintiff does not state a claim for retaliation under the New York City or State Human Rights Law, because plaintiff nowhere alleges that she opposed or complained about the discrimination she alleges. N.Y. Exec. Law § 296(7); N.Y.C. Admin. Code § 8-107(7). Moreover, her claims under Labor Law § 740 preclude her claims under the City and State Human Rights Laws for discrimination and retaliation on the basis of race and sex. N.Y. Labor Law § 740(7). Plaintiff does not allege incidents of discrimination against her based on race and sex that are distinct from the alleged incidents of retaliation in violation of Labor Law § 740. Bones v. Prudential Fin., Inc., 54 A.D.3d 589 (1st Dep't 2008); Collette v. St. Luke's Roosevelt Hosp., 132 F. Supp. 2d 256, 269 (S.D.N.Y. 2001).

Plaintiff does state a claim for discrimination based on her disability. Her allegations that defendants mocked her perceived disability, punished her for taking medical leave, and refused to provide a reasonable accommodation relate distinctly to her alleged disability as opposed to retaliation for whistleblowing. Bones v. Prudential Fin., Inc., 54 A.D.3d 589; Collette v. St. Luke's Roosevelt Hosp., 132 F. Supp. 2d at 269.

IV. CONCLUSION

For the above reasons, the court grants plaintiff's cross-motion to amend her complaint; grants defendants' motion to dismiss her Third Amended Complaint to the extent of dismissing her claims for discrimination on the basis of race and sex and for retaliation under the New York City and State Human Rights Laws; and otherwise denies defendants' motion. C.P.L.R. §§ 3025(b); 3211(a)(7). This decision constitutes the court's order.

DATED: December 6, 2012

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED
JAN 14 2013
NEW YORK
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