Raposo v Atlantic Express Transp. Group Inc.
2012 NY Slip Op 33454(U)
December 27, 2012
Supreme Court, Bronx County
Docket Number: 308769/11
Judge: Norma Ruiz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

FILED Oct 05 2012 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - PART IA-22

----------X

LORRAINE RAPOSO,

Plaintiff,

Index No. 308769/11

-against-

Present:
HON. NORMA RUIZ
J.S.C.

ATLANTIC EXPRESS TRANSPORTATION GROUP, INC., ATLANTIC EXPRESS TRANSPORTATION CORP., TOMMY JOY and JOSEPH SCAPPATURA,

Defendants.

----------X

The following papers numbered 1 to 4 read on this motion to dismiss on the calendar of July 26, 2012

Papers Numbered

Notice of Motion, Affidavits and Exhibits Annexed.....1.....
Answering Affidavits and Exhibits Annexed.....2-3.....
Replying Affidavits and Exhibits Annexed.....4.....

Motion is decided in accordance with the annexed memorandum decision.

Dated: 9/27/12

NORMA RUIZ, J.S.C.

FILED Oct 05 2012 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - PART IA-22

----------X

LORRAINE RAPOSO,

Plaintiff, Index No. 308769/11

-against-

ATLANTIC EXPRESS TRANSPORTATION GROUP, INC., ATLANTIC EXPRESS TRANSPORTATION CORP., TOMMY JOY and JOSEPH SCAPPATURA,

Defendants.

----------X

HON. NORMA RUIZ:

Defendants move to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1), on documentary evidence, CPLR 3211(a)(5), on grounds of the expiration of the statute of limitations, and CPLR 3211(a)(7) for failure to state a cause of action. Defendants Tommy Joy, (Joy), and Joseph Scappatura, (Scappatura), supervised plaintiff at the bus company of defendants, Atlantic Express Transportation Group and Atlantic Express Transportation Corp. (Collectively, Atlantic Express). Plaintiff claims that all defendants subjected her to harassment including sexual harassment and quid pro quo sexual harassment, racial and gender discrimination, hostile work environment and unlawful termination. As against Joy and Scappatura only, plaintiff claims they engaged in retaliation for her complaint of discriminatory, harassing and disparate treatment. All of the aforementioned causes of action were alleged under both the New York State Human Rights Law, (NYSHRL), and New York City Human Rights Law, (NYCHRL).

"Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence

FILED Oct 05 2012 Bronx County Clerk

submitted conclusively establishes a defense to the asserted claims as a matter of law (see, e.g., *Heaney v Purdy*, 29 NY2d 157)." *(Leon v Martinez*, 84 N.Y.2d 83, 88 [1994]). Defendants failed to submit any documentary evidence, therefore no defense has been conclusively established. That branch of defendants' motion seeking dismissal of plaintiff's complaint pursuant to CPLR 3211(a)(1) is denied.

With respect to defendants' motion pursuant to CPLR 3211(a)(5), expiration of the statute of limitations, it is undisputed that the plaintiff's allegations occurring on October 4, 2008 and thereafter, occurred within the applicable three year statute of limitations. For plaintiff's allegations occurring before October 4, 2008, defendants seek to have those allegations dismissed on expiration of statute of limitations grounds, while plaintiff seeks to have all of her allegations deemed timely under the continuing violation doctrine.

Defendants argue that plaintiff has alleged discrete acts and has not plead any facts tying the largely, pre October 4, 2008 actions of Joy, with the largely post October 4, 2008 actions of Scappatura. Therefore, defendants' argue that plaintiff cannot benefit from the continuing violation doctrine to make the pre October 4, 2008 actions of defendant timely for purposes of this lawsuit. However, in paragraph 46 and 47 of the amended complaint, plaintiff alleges that contrary to Atlantic Express policy, the confidentiality of her complaint against Joy was violated by the presence of Scappatura in the Human Resources Office when plaintiff filed the complaint. In paragraph 53, plaintiff alleges that almost immediately after filing her complaint against Joy, Scappatura began harassing and discriminating against her. In paragraph 54 plaintiff included factual details of discriminatory acts and in paragraph 55 alleges that "Scappatura's actions are similar in nature and purpose than [*sic*] Joy's action."

FILED Oct 05 2012 Bronx County Clerk

Plaintiff has alleged in factual detail, both that the actions of Joy and Scappatura are similar, and that their actions against plaintiff were linked. Plaintiff's allegations "show discriminatory conduct within the limitations period sufficiently similar to the alleged conduct without the limitations period to justify the conclusion that both were part of a single discriminatory practice, and that plaintiff's claim is therefore timely in its entirety under the continuing violation doctrine (see, *McKenney v New York City Off-Track Betting Corp.*, 903 F Supp 619, 622, citing *Cornwell v Robinson*, 23 F3d 694)." (*Walsh v Covenant House*, 244 A.D.2d 214, 215 [1st Dept 1997]). Accordingly, that branch of defendant's motion pursuant to CPLR 3211(a)(5) seeking to dismiss the allegedly untimely allegations and claims of plaintiff is denied.

Defendants argue that all claims should be dismissed against Joy and Scappatura because they have not been "shown to have any ownership interest or any power to do more than carry out personnel decisions made by others." (*Patrowich v Chemical Bank*, 63 N.Y.2d 541, 542 [1984]). However, plaintiff alleges that Joy had the discretion to assign plaintiff buses with mechanical problems, changed plaintiff's bus route, had a field supervisor follow plaintiff's bus. As to Scappatura, plaintiff alleges he assigned plaintiff buses with mechanical problems despite her seniority, and changed her route in order to take away overtime in violation of collective bargaining agreement and company policy.

Moreover, *Patrowich* can be distinguished from the case at bar in that plaintiff Patrowich was alleging that the promotion policies of the corporate defendant were discriminatory against women. *Patrowich* holds that only individuals responsible for setting that discriminatory corporate policy could be held liable for that discriminatory policy. In this action, it is the very

FILED Oct 05 2012 Bronx County Clerk

conduct of Joy and Scappatura themselves, that is the basis of plaintiff's claims.

With respect to the branch of defendants' motion that seeks dismissal pursuant to CPLR 3211(a)(7), "[o]n a motion to dismiss, the court is not called upon to determine the truth of the allegations (*see, 19 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 509, 414 N.Y.S.2d 889, 387 N.E.2d 1205). Rather, the complaint should be liberally construed in favor of the plaintiff (see, *Foley v. D'Agostino*, 21 A.D.2d 60, 65-66, 248 N.Y.S.2d 121) solely to determine whether the pleading states a cause of action cognizable at law (*see, Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17)." *(Eastern Consolidated Properties, Inc. v Lucas*, 285 AD2d 421-422 [1st Dept 2001]).

With respect to plaintiff's first two causes of action that lie in quid pro quo harassment, "[q]uid pro quo harassment occurs when unwelcome sexual conduct--whether sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature--is used, either explicitly or implicitly, as the basis for employment decisions affecting compensation, terms, conditions, or privileges of the complainant's employment." *(Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 A.D.2d 44, 50 [4th Dept 1996]). Plaintiff never alleges facts that explicitly or implicitly indicate that Joy ever sought a sexual relationship with plaintiff. Accordingly, defendants' motion is granted to the extent that the first and second causes of action are dismissed.

Joy's alleged physical contact with plaintiff's left breast as alleged in paragraph 18, along with the alleged derogatory language evidencing hostility to women in paragraph 32, does allege claims of Sexual Harassment in violation of the NYCHRL (third cause of action), that exceed "petty slights and trivial inconveniences." *(Williams v New York City Hous. Auth.*, 61 AD3d 62,

FILED Oct 05 2012 Bronx County Clerk

80 [1st Dept 2009]). Furthermore, the allegations in plaintiff's complaint are sufficient to meet the "severe or pervasive" sexual harassment standard of the NYSHRL, (fourth cause of action), for purposes of withstanding a motion to dismiss. *Id.* at 77. Accordingly, defendants' motion is denied to the extent it seeks dismissal of plaintiff's third and fourth causes of action.

In the fifth and sixth causes of action for harassment in violation of the NYSHRL and NYCHRL respectively, plaintiff appears to be seeking damages for harassment independent of any discriminatory conduct against plaintiff based on her gender or race. A cause of action for harassment without allegations of the protected status of the plaintiff will not lie. In subsequent causes of action discussed *infra,* it should be noted that plaintiff thoroughly alleges race and gender discrimination under the NYSHRL and NYCHRL, clearly referencing her protected status. Accordingly, defendants' motion is granted to the extent that the fifth and sixth causes of action are dismissed.

With respect to plaintiff's claims of racial discrimination based on disparate impact under the NYSHRL and NYCHRL, (respectively, seventh and eighth causes of action), plaintiff has alleged that both Joy and Scappatura are white and plaintiff is a black Dominican. Furthermore, in paragraph 65, it is alleged that Scappatura stated that "he does not 'speak with black bees,' and referred to plaintiff and African-Americans in general as 'black [b******].'" Throughout the complaint after specifically alleging adverse conduct by Joy and Scappatura, plaintiff alleges that Joy and Scappatura "did not treat other male non-Dominican employees in a similar manner." Plaintiff, has sufficiently alleged violations of the NYSHRL and NYCHRL due to racial discrimination. Accordingly, defendants' motion is denied to the extent it seeks dismissal of plaintiff's seventh and eighth causes of action.

FILED Oct 05 2012 Bronx County Clerk

With respect to plaintiff's ninth and tenth causes of action for gender discrimination based on disparate treatment violating the NYSHRL and NYCHRL respectively, plaintiff has alleged specific discriminatory facts based on plaintiff's gender. In addition to the pertinent paragraphs in the complaint noted above, in paragraph 30 plaintiff alleges that Joy constantly called her a "[f****** b****]." Accordingly, defendants' motion is denied to the extent it seeks dismissal of plaintiff's ninth and tenth causes of action.

While defendants' argue that the state and city hostile work environment causes of action (eleventh and twelfth causes of action, respectively), should be dismissed as the complained of conduct was outside of the statute of limitations, as noted above all of the conduct alleged in the complaint is timely under the continuing violation doctrine. *See supra.* With the inclusion of the earlier conduct of defendants, the pleadings sufficiently allege facts supporting a NYSHRL claim that the workplace [redacted] was "permeated with discriminatory intimidation, ridicule and insult." (*Matter of Bracci v New York State Div. of Human Rights* 62 A.D.3d 1146, 1148 [3rd Dept 2009] *quoting Matter of New York State Dept. of Correctional Servs. v New York State Div. of Human Rights*, 53 AD3d 823, 824 [2008]). The standard for a NYCHRL liability is "whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well that an other employees because of her gender." (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 [1st Dept 2009]). Clearly, plaintiff has alleged facts that indicate she has been treated less well than other employees based on gender. Accordingly, defendants' motion is denied to the extent it seeks dismissal of plaintiff's eleventh and twelfth causes of action.

"To establish a prima facie case of retaliation, the plaintiff must show participation in a protected activity known to the employer, an adverse employment action based upon that

FILED Oct 05 2012 Bronx County Clerk

protected activity, and a causal connection between the protected activity and the adverse employment action." *(Baldwin v Cablevision Sys. Corp.* 65 A.D.3d 961, 967 [1st Dept 2009]). Defendants argue that plaintiff fails to establish a retaliation cause of action because too long of a time passed between the alleged protected activity of plaintiff and her termination. However, plaintiff's termination was not the only alleged adverse employment action. Plaintiff also alleged that she was compelled to transfer to other bus garages, was removed as a 19-A examiner, removed as a first aid instructor and removed as a bus driver instructor. All of the aforementioned adverse employment actions were considerably closer in time to various protected activities performed by plaintiff than her alleged unlawful termination. Accordingly, defendants' motion is denied to the extent it seeks dismissal of plaintiff's thirteenth and fourteenth causes of action.

With respect to the unlawful termination claim under the NYSHRL and NYCHRL, defendant argues that such claims are duplicative of the retaliation claims. However, there is a difference in scope between the unlawful termination claim and retaliation claims as the unlawful termination claims are against all defendants, while the retaliation claims are against Joy and Scappatura only. As to the substance of the claims themselves, the retaliation claim encompasses several adverse employment actions, not just the unlawful termination. Furthermore, the cases cited by defendants regarding the duplicative nature of plaintiff's claims, such as *Conde v Yeshiva Univ.*, 16 AD3d 185 (1st Dept 2005), are inapposite as the cases do not hold that retaliation claims are duplicative of unlawful termination claims, nor are the cited cases analogous to the case at bar. Accordingly, defendants' motion is denied to the extent it seeks dismissal of plaintiff's fifteenth and sixteenth causes of action.

FILED Oct 05 2012 Bronx County Clerk

CONCLUSION

Defendants motion to dismiss is granted to the extent that the first, second, fifth and sixth causes of action are dismissed pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Defendants' motion is otherwise denied.

This is the decision and order of the Court.

Dated: 9/27/12

NORMA RUIZ, J.S.C.