King v Mount Sanai Hosp.
2013 NY Slip Op 33691(U)
October 7, 2013
Sup Ct, NY County
Docket Number: 402278/11
Judge: Joan A. Madden

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11
Justice

Index Number : 402278/2011
KING, HENRY
vs.
THE MOUNT SINAI
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: October 7, 2013

_____, J.S.C.

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 11

HENRY KING,

Plaintiff,

- against -

THE MOUNT SINAI HOSPITAL and JEFF COHEN,

Defendants.

Index No.: 402278/11

DECISION/ORDER

MADDEN, JOAN A., J.:

In this action, plaintiff Henry King (King), proceeding pro se, sues his former employer, defendant The Mount Sinai Hospital (Mount Sinai), to recover damages allegedly sustained as a result of the termination of his employment. The complaint alleges causes of action for breach of contract and wrongful termination. Defendants Mount Sinai and Jeff Cohen, Mount Sinai's Vice President for Labor Relations, move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Background

Plaintiff was employed by Mount Sinai for 30 years, from February 1981 until he was terminated in January 2011. During his employment at Mount Sinai, plaintiff was a member of New York's Health & Human Services Union, 1199 SEIU, United Health Care Workers East (Union), and, in 1985, he became a union delegate, which he remained until his termination. The collective bargaining agreement between the Union and Mount Sinai provided a three-step process for resolving employee grievances,

which included a grievance hearing, and arbitration if the dispute otherwise could not be resolved.

In 2006, plaintiff was accused of harassment by another employee, and, in November 2006, following an investigation, Mount Sinai determined that he had engaged in harassment and issued him a warning notice (final warning), which advised him that any future findings of similar conduct would subject him to disciplinary action. *See* King Dep., Ex. 1 to Sauer Reply Aff., at 15; Warning Notice, Ex. A to King Dep., Ex. 1 to Sauer Aff. in Support of Defendants' Motion.[1] The Union challenged the issuance of the final warning, on plaintiff's behalf, and, after a hearing resulting in denial of the grievance, the Union demanded arbitration. Just prior to commencement of the arbitration, however, on May 16, 2008, the parties resolved the dispute and entered into a written settlement agreement. *See* Agreement of Settlement and Release (Agreement or May 2008 agreement), Ex. B to King Dep. The Agreement provided, among other things, that plaintiff would be transferred from his position as a Medical Records Clerk in the Medical Records Department to a position as Medical Clerical Associate in the Call Center, and that upon that transfer, the final warning would

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[1]The citations to plaintiff's deposition testimony refer to the transcript annexed to Sauer's Reply Affirmation, because it is the entire transcript. The cited exhibits to plaintiff's deposition are, however, annexed to the transcript submitted with Sauer's Affirmation in Support of Defendants' Motion.

be removed from plaintiff's personnel file. *Id.*, ¶¶ 2, 3. The Agreement also provided that it "shall remain confidential . . . and shall not be raised in any future proceeding, grievance or arbitration." *Id.*, ¶ 12.

Plaintiff began working in the Call Center in June 2008. King Dep. at 26. In or around August 2010, Lamoy Coburn (Coburn) became plaintiff's supervisor. *Id.* at 25. On December 28, 2010, plaintiff and Coburn, who are both African-American, got into, as plaintiff described it, a discussion about whether another employee, who had arrived late to work because of a snowstorm, was entitled to a break. King Dep. at 26-28. Although plaintiff continues to dispute what was said during this discussion, according to defendants, plaintiff became rude and loud, harshly criticized Coburn's supervisory abilities and made racist remarks to her, including calling her "a house nigger" and stating that "there ain't nothing worse than a house nigger." *See* Warning Notice, Ex. F to King Dep.; Opinion and Award (Arbitrator's Decision), Ex. D to King Dep., at 5-6.

Plaintiff was suspended the same day, pending an investigation of charges of insubordination and use of abusive language. King Dep. at 45-46; Warning Notice, Ex. D to King Dep. Following defendants' investigation, plaintiff was terminated, effective January 5, 2011. King Dep. at 50-52; Warning Notice, Ex. F to King Dep. The Union filed a grievance challenging

plaintiff's termination, and a grievance hearing was held on January 25, 2011. Following the hearing, the grievance was denied, and the Union demanded arbitration. An arbitration hearing was held on March 18, 2011, at which plaintiff was represented by counsel, and witnesses for both sides were called.

By decision dated April 28, 2011, the arbitrator upheld plaintiff's termination for insubordination and use of abusive language, finding plaintiff's version of events not credible, and finding credible the testimony of a former employee who corroborated Coburn's version of events that plaintiff called her a "house nigger" in front of other employees. Arbitrator's Decision, Ex. D to King Dep., at 9. The arbitrator concluded that plaintiff was "both intolerant and insubordinate" to Coburn, and that his "gross insubordination" was grounds for termination. *Id.* at 11, 12. The arbitrator also found that plaintiff's termination was not motivated by retaliation for his union activities, and was not the result of disparate treatment. *Id.* at 13-14.

Plaintiff subsequently commenced this lawsuit in August 2011. His breach of contract claim is based on allegations that defendants breached the May 2008 agreement by failing to remove the November 2006 final warning from his file, and by disclosing, in violation of the confidentiality provision of the Agreement, the existence of the final warning at his 2011 grievance and

arbitration hearings. Complaint, ¶¶ 4, 7; King Dep. at 69-72, 90-91, 93. Plaintiff asserts, in addition, that he was wrongfully terminated because he was accused of something he did not do (*id.* at 108) and was discharged without taking into consideration his 30 years of service (*id.* at 145-146), because Jeff Cohen and the Labor Relations Department had it out for him, and others, for opposing a proposed Union give back (*id.* at 81-83, 108, 110), and because of his union activities. *Id.* at 81, 141-142.

Discussion

It is well settled that to prevail on a motion for summary judgment, the moving party must, by submitting evidentiary proof in admissible form, establish the cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212 (b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such showing has been made, to defeat summary judgment, the opposing party must show, also by producing evidentiary proof in admissible form, that genuine material issues of fact exist which require a trial of the action. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman*, 49 NY2d at 562. The evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion

must be denied if there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978); *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). "However, only the existence of a bona fide issue raised by evidentiary facts . . . will suffice to defeat a motion for summary judgment." *IDX Capital, LLC v Phoenix Partners Group LLC*, 83 AD3d 569, 570 (1st Dept 2011), *affd* 19 NY3d 850 (2012) (internal citation omitted); *see Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772, 773 (1st Dept 1983), *affd* 62 NY2d 686 (1984); *Rotuba Extruders, Inc.*, 46 NY2d at 231. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact. *Zuckerman*, 49 NY2d at 562; *see Colarossi v University of Rochester*, 2 NY3d 773, 774 (2004).

Breach of Contract

A breach of contract claim must set forth the existence of a valid contract, plaintiff's performance of his obligations thereunder, defendant's breach and damages resulting from the breach. *See Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010); *Morgan Stanley Altabridge Ltd. v ESE Funding SPC Ltd.*, 60 AD3d 497, 497 (1st Dept 2009); *Morris v 702 East Fifth St HDFC*, 46 AD3d 478, 479 (1st Dept 2007). "'[D]amages which are the natural and probable consequence of the breach'" generally are recoverable by the nonbreaching party. *Bi-Economy Mkt., Inc.*

v Harleysville Ins. Co. of N.Y., 10 NY3d 187, 192 (2008), quoting *Kenford Co. v County of Erie*, 73 NY2d 312, 319 (1989); *see 34-35th Corp. v 1-10 Indus. Assoc., LLC*, 103 AD3d 709, 710-711 (2nd Dept 2013). To satisfy the damages element, the plaintiff must show that the breach "directly and proximately caused" the plaintiff's injury. *Rose Lee Mfg., Inc. v Chemical Bank*, 186 AD2d 548, 551 (2nd Dept 1992); *see Weiss v TD Waterhouse*, 45 AD3d 763, 764 (2nd Dept 2007); *Harding v Naseman*, 2009 WL 1953041, *28, 2009 US Dist LEXIS 58149, *99 (SD NY 2009), *affd* 377 Fed Appx 48 (2d Cir 2010). "In other words, the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes." *Kenford Co. v County of Erie*, 67 NY2d 257, 261 (1986); *see Pitcock v Kasowitz, Benson, Torres & Friedman LLP*, 74 AD3d 613, 615 (1st Dept 2010); *Standard Fed. Bank v Healy*, 7 AD3d 610, 612 (2nd Dept 2004); *Smith v Chase Manhattan Bank, USA, N.A.*, 293 AD2d 598, 600 (2nd Dept 2002); *Rose Lee Mfg., Inc.*, 186 AD2d at 551. Thus, the fact that defendant breached the contract is insufficient to sustain a complaint "[w]here a party has failed to come forward with evidence sufficient to demonstrate damages flowing from the breach." *Lexington 360 Assoc. v First Union Natl. Bank of N. Carolina*, 234 AD2d 187, 190 (1st Dept 1996); *see Viacom Outdoor, Inc. v Wixon Jewelers, Inc.*, 82 AD3d 604, 604 (1st Dept 2011);

Rakylar v Washington Mut. Bank, 51 AD3d 995, 996 (2nd Dept 2008).

Defendants argue that the breach of contract claim should be dismissed because plaintiff has no evidence that defendants failed to remove the final warning from his file, or that the final warning was discussed at the January 2011 grievance hearing or the March 2011 arbitration hearing. Defendants also argue that plaintiff cannot show any damages resulting from the alleged breach.

Plaintiff testified that, at the time of the January 2011 grievance hearing, a union representative told him that it was in his personnel file, and that, sometime later, before the March 2011 arbitration hearing, he saw the file with the final warning in it. King Dep. at 70-75. Plaintiff also testified that the final warning was not discussed at the grievance hearing (*id.* at 75), but was mentioned (*id.* at 77), and that the Agreement was not mentioned at the arbitration hearing, but the final warning was indirectly referred to when Mount Sinai's attorney objected to the Union attorney's statement that plaintiff had no prior discipline since 1992. *Id.* at 93-96, 101-104. Plaintiff further stated that the arbitrator asked him no questions about prior discipline and the arbitration decision does not mention the Agreement or his prior discipline. *Id.* at 98, 100-101.

Even assuming, for purposes of this motion only, that plaintiff's testimony raises an issue of fact as to whether

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defendants removed the final warning from his file or disclosed the Agreement, plaintiff cannot succeed on his breach of contract claim because there is no evidence that the alleged breach "directly and proximately" caused plaintiff's alleged damages. Plaintiff claims that he lost a house, an apartment, and "everything" because he was terminated, and claims that he was damaged by the final warning remaining in his file because "companies do ask for references." *Id.* at 80-81. He testified, however, that he was terminated for "using the N word," and for insubordination (*id.* at 84-85), and that he would have been terminated for insubordination even if the warning had been removed from his file and even if the prior discipline had not been mentioned at the grievance and arbitration hearings. *Id.* at 89, 111-112, 148-149. Further, there is no mention of the 2006 final warning in his termination notice and no evidence that the arbitrator knew about or considered the 2006 final warning or the May 2008 agreement when reaching her decision that there was just cause to terminate plaintiff for insubordination. The evidence, therefore, does not support finding that any alleged breach of the Agreement caused him injury. Plaintiff's assertions that he may have lost employment opportunities and suffered other damages as a result of the alleged breach are too speculative to sustain the claim. *See Rakylar*, 51 AD3d at 996.

As to plaintiff's claim of wrongful termination, plaintiff

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asserts that his employment was wrongfully terminated because he was not insubordinate, engaged in no misconduct warranting discharge, and was a 30-year employee with a good service record. Plaintiff also claims that his termination for insubordination was a pretext for retaliation for his union activities. These claims, however, were previously decided in the arbitration proceeding. *See* Arbitrator's Decision, Ex. D to King Dep. Further, plaintiff had a full and fair opportunity in the arbitration proceeding to litigate the claims and issues he has raised in this case, and has expressly acknowledged that his claim that he was fired because of his Union activities was addressed and determined by the arbitrator. King Dep. at 143-144.

Under such circumstances, "[i]t is well settled that prior arbitration awards may be given preclusive effect in a subsequent judicial action." *Bernard v Proskauer Rose, LLP*, 87 AD3d 412, 415 (1st Dept 2011); *see Matter of Falzone v New York Cent. Mut. Fire Ins. Co.*, 15 NY3d 530, 534 (2010); *Board of Educ. of Patchogue-Medford Union Free School Dist. v Patchogue-Medford Congress of Teachers*, 48 NY2d 812, 813 (1979); *Waverly Mews Corp. v Waverly Stores Assoc.*, 294 AD2d 130, 132 (1st Dept 2002) (res judicata and collateral estoppel apply to arbitration awards). The arbitration decision, therefore, precludes plaintiff's wrongful termination claim from being litigated in this court.

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Although plaintiff correctly contends that the Unemployment Insurance Appeal Board (Board) found that, for purposes of awarding unemployment benefits, he did not engage in misconduct (*see* Decision of the Board, Ex. 3 to Plaintiff's Affidavit in Opposition), the Board's decision "lacks preclusive effect in a subsequent action or proceeding" (*Silberzweig v Doherty*, 76 AD3d 915, 916 [1st Dept 2010]), and does not change the result in this case. *See Matter of Strong v New York City Dept. of Education*, 62 AD3d 592, 593 (1st Dept 2009); *Matter of Watson v Bratton*, 243 AD2d 295, 295 (1st Dept 1997); *Wooten v New York City Dept. of Gen. Servs.*, 207 AD2d 754, 754 (1st Dept 1994). Furthermore, "New York does not recognize the tort of wrongful discharge." *Lobosco v New York Tel. Co./NYNEX*, 96 NY2d 312, 316 (2001).

The court recognizes the difficult and unfortunate situation Mr. King is in, as an older worker losing a job he held for 30 years. On this record, however, plaintiff's claims for breach of contract and wrongful termination cannot be sustained.

Accordingly, it is

ORDERED that defendants' motion is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: October 7, 2013

J.S.C.