Matter of Rosenfeld v Fina
2014 NY Slip Op 30627(U)
March 7, 2014
Supreme Court, New York County
Docket Number: 100598/13
Judge: Louis B. York
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SCANNED ON 3/17/2014

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100598/2013
ROSENFELD, OLIVIA
VS
FINA, MICHAEL C.
Sequence Number : 001
OTHER RELIEFS

PART 2

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 accompanying decision.

FILED
MAR 17 2014
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3-7-14

LOUIS B. YORK, 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
COUNTY OF NEW YORK : IAS PART 2
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In the Matter of the Application of
OLIVIA ROSENFELD,

Petitioner,

INDEX NO.
100598/13

-against-

MICHAEL C. FINA,

Respondent.

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FILED
MAR 17 2014
COUNTY CLERK'S OFFICE
NEW YORK

LOUIS B. YORK, J.:

In this Article 78 proceeding, petitioner, a 63-year-old Asian of Filipino national origin acting *pro se*, challenges a New York State Division of Human Rights ("DHR") determination and order after investigation (the "DHR decision," exhibit A to DHR's answer) finding there was no probable cause to believe that petitioner's former employer, Michael C. Fina, Inc. ("Fina"), discriminated against her because because of her race or retaliated against her because she filed a prior DHR complaint against Fina alleging harassment and discrimination.

Fina cross-moves for "[a]n order granting[*sic*] dismissing the Petition pursuant to CPLR 3211(a)(7)" and for such other relief as the court deems just and proper.

According to the petition, petitioner was hired by Fina in March 2003 as a sales associate and terminated on August 15, 2012. At the time of her termination, petitioner had achieved the position of design consultant, and was Fina's highest producing employee. Petitioner alleges that she was consistently harassed and treated unfairly by her white supervisor, Meryl Gold ("Gold"),

but put up with it because she was afraid of losing her job if she complained. Finally, in March 2012, petitioner filed a race discrimination complaint against Fina with DHR (case # 10153606) in "response to unwarranted write ups and harassment" from Gold.

According to Fina and the DHR decision, Fina, which was closing its shop on Fifth Avenue to move to more modest premises, decided in January 2012 to do a reduction in force ("RIF"). It appears that although Fina selected at that time which employees would be laid off as part of the RIF, the employees, who were laid off over the course of a year rather than all at once, were not told they were going to lose their jobs until they were actually terminated. Petitioner was scheduled to be laid off in December 2012 along with several other employees, but was prematurely fired on August 15 "as a result of continued customer and co-worker complaints about her conduct and performance" (DHR decision, p 1). Less than a week later, petitioner filed the administrative complaint at issue here (DHR case # 10156923). On August 31, 2012, two weeks after petitioner's termination, DHR issued a determination and order dismissing her first complaint, finding that she had been "disciplined" and "counseled" for reasons unrelated to her race rather than harassed because of it. In addition, since petitioner had not been fired at the time she filed her first DHR complaint, the agency found that Fina's disciplinary actions were not tantamount to the requisite "adverse employment action."

DHR proceeded with its investigation of the allegations in petitioner's second complaint, which consisted of reviewing the evidence initially submitted by petitioner, the opposing evidence submitted by Fina, and the rebuttal evidence submitted by petitioner. Petitioner's evidence (proffered to the court in three volumes of exhibits) included various e-mails supporting her detailed accounts of the incident cited against her by Fina, which petitioner contends show

the alleged complaints against her were baseless, and evidence that Fina had advertised for and hired sales personnel subsequent to petitioner's termination, which petitioner contends belies Fina's claim that she was discharged as part of the planned RIF. In its "final investigative report and basis of determination" DHR concluded that petitioner's termination was accelerated because in July 2012 two sales associates complained that petitioner was stealing their clients and creating a "hostile and disruptive work environment for them" (p 3). DHR's investigator also concluded that the sales force hired by Fina after petitioner's discharge was not meant to replace petitioner but rather several employees who were to be retained after the RIF but voluntarily left Fina's employ (*ibid.*). In February 2013, DHR issued its no probable cause decision and dismissed petitioner's second complaint.

In challenging a DHR determination, a petitioner may raise only three questions: (1) whether DHR "failed to perform a duty enjoined upon it by law"; (2) whether DHR acted "without or in excess of jursidiction"; and, (3) whether DHR's "determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[1], [2] and [3]).[1]

The gravamen of the petition is that DHR's investigation consisted of rubber-stamping Fina's version of the facts without considering the evidence petitioner submitted in rebuttal to Fina's submissions. If petitioner established the truth of these allegations, she would be entitled to have DHR's decision set aside pursuant to CPLR 7803[3]. As Fina's counsel states in her memorandum of law, a DHR decision is only to be "overturned [if] it is shown that the

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[1] The statute allows a petitioner to raise another issue, whether an agency's determination made as the result of a hearing was supported by substantial evidence (CPLR 7804[4]). Since no such hearing was held by DHR, that inquiry is not an issue in this proceeding.

investigation was one-sided or abbreviated" (respondent's memo, unnumbered p 7). "The DHR has broad discretion in determining the method to be employed in investigating a claim, and its determination will not be overturned unless the record demonstrates that its investigation was 'abbreviated or one-sided'" (*Bal v NYS Dept Human Rights*, 202 AD2d 236, 237 [1st Dept 1994], lv den 84 NY2d 805 [1994], citing *Matter of Chirgotis [Mobil Oil Corporation]*, 128 AD2d 400, 403 [1st Dept 1987], lv den 69 NY2d 612 [1987], rearg den 70 NY2d 748 [1987]).

"It is axiomatic that a court reviewing the determination of an agency may not substitute its judgment for that of the agency and must confine itself to resolving whether the determination was rationally based" (*Matter of Medical Malpractice Insurance Association [Superintendent of Insurance of the State of New York]*, 72 NY2d 753, 763 [1988], cert den 490 US 1080 [1989]). Generally, "[a]ll that is required is that the agency's determinations have a rational basis in the record before it and that its determinations not be arbitrary or capricious" (*Colton v Berman*, 21 NY2d 322, 334 [1967]). However, the court is not a simple extension of the administrative process. "In an Article 78 proceeding, the reviewing court does not act as a rubber stamp, but, rather, exercises a genuine judicial function and does not confirm a determination simply because it was rendered by an administrative agency" (*Matter of Soho Community Council [NY State Liquor Authority]*, 173 Misc 2d 632, 635 [Sup Ct, NY Co, Abdus-Salaam, J, 1997], citing *300 Gramatan Ave. Associates v State Division of Human Rights*, 45 NY2d 176, 181 [1978]).

Fina has cross-moved to dismiss this proceeding pursuant to CPLR 3211(a)[7] for failure to state a cause of action, and the bulk of counsel's supporting affirmation is devoted to attacking the substantive merits of petitioner's administrative complaint. The court finds this effort to be at best misguided. CPLR 3211(a)[7] is not applicable to an Article 78 proceeding. As discussed

above, a petitioner in such a special proceeding may only prevail by establishing one of the issues enumerated in CPLR 7803. A motion to dismiss an Article 78 petition must be made pursuant to CPLR 404(a) and 7804(f), both of which specify that "the respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition."

However, despite the infirmities of Fina's cross-motion, the court finds that the petition cannot be sustained, at least in its present form. Judicial review of a DHR order must be sought in a special proceeding commenced by the filing of a petition naming as respondents DHR and all other parties to the administrative proceeding before DHR (22 NYCRR § 202.57[a]). The petition herein does not comport with these requirements.

The request for judicial intervention form ("RJI") signed by petitioner describes it as an appeal and lists counsel for both Fina and DHR as the parties' attorneys, and it appears that both Fina and DHR were served. DHR has submitted an answer, albeit a nominal one, along with the administrative record. Nonetheless, Fina is the only respondent named in the petition, the notice of petition, and the RJI. In addition, from the papers now before the court, it is impossible to ascertain the actual contents of either the notice of petition or verified petition in this proceeding. There are four different versions of these pleadings at bar – an unprecedented occurrence in this court's experience.

In the version contained by the Supreme Court Records OnLine Library, the notice of petition has the index number stamped (as well as another stamped index number crossed out) and the line for "date signed" is left blank. Next to that line is stamped "FILED Apr 12 2013 County Clerk's Office New York." The first page of the accompanying verified petition does not bear either an index number or a County Clerk stamp. The second page lists descriptions of the

documents purportedly attached to the petition as exhibits A through H (none submitted to the court in such form).

The notice of petition annexed to the RJI has the index number handwritten and the date signed line filled in (April 11, 2013). Stamped at the top right corner of the page is "New York County Clerk's Office Apr 12 2013 Not Compared with Copy File." The first page of the accompanying verified petition has the index number handwritten and the same stamp as the notice of petition, also on the top right corner. The second page describes purportedly attached documents as exhibits A through G, and the descriptions of exhibits F and G are different from the documents described in the foregoing version of the petition. Both documents have been photocopied so as to omit approximately four lines from the bottom of each page.

Fina has submitted two other, different versions of the notice of petition and verified petition as part of its cross-moving papers. The first of these two versions of the notice of petition has a handwritten index number and blank date signed line. "New York County Clerk's Office Apr 12 2013 Not Compared with Copy File" is stamped below the "Notice of Petition" caption. "(OVER)" is handwritten in large print between the date signed line and petitioner's address, although the reverse side of the page is blank, and Fina's counsel's name and address are hand printed on the bottom right corner of the page. The first page of the accompanying verified petition bears a handwritten index number and "New York County Clerk's Office Apr 12 2013 Not Compared with Copy File" is stamped below the "Verified Petition" caption. The second page of the petition does not contain a portion of petitioner's statement which was written running down the right margin of the page in the two versions described above. Purportedly annexed documents are listed as exhibits A through E, but the descriptions of exhibits A through

C are different (abbreviated) than then ones described above. The letters F, G, H and I are listed below the other exhibits (whitout the word "exhibit") but the lines for the description of documents are blank. The third page, which at first blush looks the same, reveals that the last sentence in the narrative has been written differently in this version. The most marked difference in this petition is a typed page inserted between the handwritten notice of petition and petition. This would seem to be a transcription of the handwritten narrative in the notice of petition immediately followed by the verified petition. Astonishingly, it is not a transcription but rather a rewording augmented by statements which were not at all present in the original version. From the writing style and syntax, it is clear that the typed page and the handwritten forms were not written by the same person. There is no indication as to whether counsel received the typed page along with the handwritten ones or whether, for reasons best known to herself, she created it – perhaps for the court's convenience, since the handwritten forms are almost illegible in parts.

The second notice of petition furnished by Fina is identical to the first except it does not have its counsel's name and address added. The first page of the verified petition is identical to Fina's first submission, but the second page, which also omits the writing along the margin, has the "E" in exhibit E changed to an "F" and a description filled in for exhibits F [now "E"] and G. As is the case in the first three versions, none of the documents described as exhibits are attached in that form. This version of the petition also has a typed sheet inserted between the notice of petition and the petition, which, incredibly, is different not only from the handwritten petitions, but also from the typed sheet inserted in Fina's first version.

The court is mindful of the fact that petitioner is appearing *pro se* in this proceeding. The pleadings of *pro se* petitioners are to be considered liberally in their favor (see *Haines v Kerner*,

404 US 519, 520 [1972], rehearing den 405 US 948 [1972]), "Since most *pro se* plaintiffs lack familiarity with the formalities of pleading requirements, [the court] must construe *pro se* complaints ... applying a more flexible standard to evaluate their sufficiency" (*Johnson v Wright*, 234 F Supp 2d 352, 359 [SDNY 2002]). However, the above-described anomalies of the instant petition would require more than liberal flexibility to pass muster.

Accordingly, petitioner's application is denied and the petition is dismissed without prejudice to the commencement of a new proceeding which comports with this decision.

Fina's cross-motion is granted only to the extent that it seeks discretionary relief from the court, and is denied to the extent that it seeks dismissal of the petition pursuant to CPLR 3211(a)[7].

This decision constitutes the judgment of the court.

DATED: March 7, 2014

J.S.C.

LOUIS B. YORK
J.S.C.

FILED

MAR 17 2014

COUNTY CLERK'S OFFICE
NEW YORK