Polite v Marriott Marquis Hotel, Manhattan
2017 NY Slip Op 33335(U)
August 17, 2017
Supreme Court, Kings County
Docket Number: 509830/2015
Judge: Kathy J. King
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At an I.A.S. Part 64 of the Supreme Court of the State of New York, held in the County of Kings at the Courthouse, 360 Adams Street, Brooklyn, New York, on the 17th day of August, 2017.

PRESENT: HON. KATHY J. KING,
Justice.

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LAWRENCE POLITE,

Plaintiff,

-against-

MARRIOTT MARQUIS HOTEL, MANHATTAN; HENRY ARYEF; and DOES 1-10,

Defendant.

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DECISION/ORDER

Index No. 509830/2015

Motion Sequence No. 2

The following papers numbered 1-2 read herein:	Papers Numbered:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	

After oral argument and upon the foregoing papers, the within motion is decided as follows:

In this action for discrimination based on race and disability, defendants, Marriott International, Inc. ("Marriott Hotel") and Henry Arias, ("Arias") move to dismiss plaintiff's complaint with prejudice, pursuant to CPLR §§3211 (a)(7) and (a)(8). Plaintiff, Lawrence Polite's ("Polite") complaint asserts violations of the following: (1) Title VII ("Title VII") of the Civil Rights Act of 1964; (2) New York State Human Rights Law/New York Executive Law §§296 et seq. ("SHRL"); and (3) New York City Human Rights Law/NYC Administrative Code §§8-107 et seq. ("CHRL"); and (4) 42 USC § 1981. Plaintiff orally opposes the requested relief.[1]

[1] The Court does not consider plaintiff's cross-motion in opposition since it was marked-off the court's calendar on December 18, 2016 and not restored.

Polite was terminated by Marriott Hotel, on August 28, 2012, two months after he began working as a Stewarding Manager for defendant. Polite, a black male, asserts that his supervisor, Henry Arias, a Hispanic male, told him "he did not belong there because he was black" and subjected him to a hostile work environment. On August 9, 2012, Polite was injured at work and, as a result, was out of work until August 18, 2012. According to the complaint, upon plaintiff's return to work. Arias told him he was not even supposed to be at work, and did not permit him to return. On August 28, 2012, plaintiff was terminated from his job as Stewarding Manager. In August 10, 2015, Polite commenced the underlying race and disability discrimination action, together with retaliation claims, against Marriott Hotel. Marriott Hotel filed this motion to dismiss in lieu of filing an answer to the complaint.

Marriott Hotel seeks dismissal of plaintiff's causes of action based on discrimination and retaliation based on lack of personal jurisdiction pursuant to CPLR §3211(a)(8), as to individual defendant Henry Arias, and for failure to state a cause of action pursuant to CPLR 3211§(a)(7) for plaintiff's causes of action based on discrimination and retaliation, as to Marriott Hotel and Henry Arias.

As to CPLR 3211§ (a)(8), defendant Arias argue that the Court lacks personal jurisdiction because plaintiff's attempted service by way of suitable age and discretion was defective due to the misspelling of Henry Arias' name. The statutory mailing was addressed to "Henry Aryef" and not to Henry Arias, and was mailed to the Marriot Hotel's address. Thus, defendant Arias did not receive the summons and complaint. Plaintiff, in opposition, argues that the misspelling error is ministerial which the court should excuse pursuant to CPLR 2001.

The Court disagrees, and finds that the misspelling of Henry Arias' name is a fatal defect, warranting dismissal under CPLR 3211§ (a)(8).

Defendants also argue that plaintiff's causes of action alleging violations of SHRL and CHRL fail to plead a cause of action pursuant to CPLR 3211§(a)(7). The Court agrees.

On a motion to dismiss pursuant to CPLR 3211§(a)(7), the pleading is to be afforded a liberal construction. The court must accept as true the facts as alleged in the complaint, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994); *Widman v. Rosenthal*, 40 A.D.3d 749, 834 N.Y.S.2d 862; *Richmond Shop Smart, Inc. v. Kenbar Dev. Ctr*., LLC, 32 A.D.3d 423, 820 N.Y.S.2d 124). Whether a plaintiff can ultimately establish his allegations is not part of the calculus in determining a motion to dismiss (see *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26; *International Oil Field Supply Servs. Corp. v. Fadeyi*, 35 A.D.3d 372, 375, 825 N.Y.S.2d 730). *See Farber v. Breslin*, 47 A.D.3d 873850 N.Y.S.2d 6042008 N.Y. Slip Op. 00647 [2nd Dept 2008]

To establish a prima facie case of discrimination under the SHRL and CHRL, the plaintiff must establish that: (1) he is a member of a protected class; (2) he is qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination (*see*, *Ferrante v American Lung Assn*., 90 NY2d 623, 629 [1997]; *Bailey v New York Westchester Sq. Med. Ctr*., 38 AD3d 119, 122-123 [1st Dept 2007]). Affording plaintiff the benefit of all reasonable inferences, the Court finds that a single statement allegedly made by Arias does not give rise to an inference of discrimination without establishing a nexus between the remark made and plaintiff's termination.

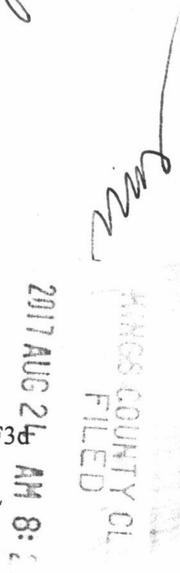
Using the same reasoning, Polite's retaliation claims based on violations of SHRL and CHRL also fail. *See Wojcik v Brandiss*, 973 F. Supp 2d 195, 2013 U.S.Dist. LEXIS 137449, 2013 WL 5407208 (E.D.N.Y).

Plaintiffs remaining claims must also be dismissed[2] Polite fails to state in factual detail the disability classification that he experienced, and whether the defendants were aware of his disability classification and that the defendants discriminated against him as a direct result of that disability. Polite also fails to plead that he was denied a particular service which was a refusal to accommodate his disability. *See Fruchtman v. City of New York*, 129 AD3d 500, 11 NYS3d 582, 2015 NY Slip Op 04937, (1st Dept, 2015). Accordingly, the Court finds plaintiff's discrimination claims based on race and disability fail as a matter of law.

Based on the foregoing, defendant's motion is granted to the extent of dismissing plaintiff's claims with prejudice under Title VII, SHRL and CHRL pursuant to CPLR 3211§ (a)(7), in all other respects the motion is denied.

E N T E R,

HON. KATHY J. KING
J.S.C



[2] The Court notes that filing of charges with the Equal Employment Opportunity Commission is a condition precedent to the commencement of a Title VII action (see 42 USC § 2000e-5 [f] [1]; Cornwell v Robinson, 23 F3d 694, 706). Here, plaintiff neither appends a "right to sue" letter from the EEOC, nor refers to it (see, Briggs v. Women in Need, Inc., 2010 WL 2076981 [ED NY 2010]; Crisci-Balestra v. Civil Serv. Empls. Assn., 2008 WL 413812 [ED NY 2008]). Accordingly, plaintiff's Title VII claims are dismissed.