Charles River Mgt. v Casiano
2018 NY Slip Op 30008(U)
January 3, 2018
Supreme Court, New York County
Docket Number: 153114/15
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

CHARLES RIVER MANAGEMENT, D/B/A SECURE SELF-STORAGE

- v -

WILTON CASIANO, JR.

INDEX NO. 153114/15

MOT. DATE

MOT. SEQ. NO. 002

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____
Replying Affidavits NYSCEF DOC No(s)._____

Plaintiff moves for summary judgment in his favor. Although not properly noticed in either its original notice of motion or the amended notice of motion, plaintiff's counsel, which also represents the third-party defendant (sometimes "Ozzy"), seeks summary judgment dismissing the defendant/third-party plaintiff's counterclaims. Defendant opposes the motion, including the request for summary judgment on the third-party complaint, and cross-moves for an order striking the third-party's answer based upon his failure to appear for a deposition and for attorneys fees and costs. Plaintiff and the third-party defendant oppose the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

Plaintiff manages self-storage facilities in New York City. Plaintiff hired the defendant on April 1, 2010 as an at-will assistant manager. In June 2012, plaintiff hired the third-party defendant as an assistant manager, who worked with the defendant. Defendant's job duties included light cleaning, maintenance and customer service. In its complaint, plaintiff claims that defendant "was a below average to average employee with a history of performance problems and infractions." The complaint further alleges that in August 2014, two of plaintiff's customers complained about defendant's behavior to his immediate supervisor, the third-party defendant. Further, on September 21, 2014, defendant allegedly violated company policy and his supervisor's instructions. As a result, defendant was issued an Infraction Notice and Written Warning at that time.

The next day, defendant informed plaintiff's District Manager, Jean-Paul Lacon, at approximately 11am via text message that he was sick and would not be in. The District Manager admonished defendant for calling in at 11am when he was scheduled to open. Plaintiff called out sick from September 24 – 27, 2014. When he returned to work on October 1, 2014, he received an Infraction Notice and Written Warning.

The District Manager intended to terminate defendant on October 15, 2014. However, on October 14, 2014, plaintiff received notice of defendant's complaint filed with the New York State Division of

Dated: 1/3/18

HON. LYNN R. KOTLER, 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

Human Rights ("NYSDHR") on September 22, 2014 wherein he claims that his supervisor harassed him, used derogatory language, made sexually inappropriate gestures and caused anxiety to plaintiff and aggravated his heart condition. Defendant further claimed that he had complained about his supervisor to the District Manager, but his complaints were ignored.

In response to the complaint, the District Manager interviewed defendant's supervisor and transferred defendant to a Brooklyn work-site, which it claims was the only facility with a staffing vacancy. Defendant then filed a second complaint with the NYSDHR on October 17, 2014, complaint about his transfer to Brooklyn.

Meanwhile, plaintiff claims that defendant was late for work on October 22, October 27, October 29, and November 2, 2014 and blamed his commute. On November 3, 2014, the District Manager terminated defendant for lateness.

Defendant ultimately withdrew his complaints before the NYSDHR. By way of this action, plaintiff seeks a declaration that defendant's employment was at-will, that defendant's transfer and termination as an at-will employee were lawful non-discriminatory business decisions, and that defendant is not entitled to any relief under the New York State Human Rights Law ("NYSHRL") or the New York City Human Rights Law ("NYCHRL").

Defendant then served upon plaintiff a "Summons" and "Answer with Counterclaims" with a caption reflecting a third-party action against Ozaniro Edorio. Defendant asserts the following affirmative defenses: failure to state a cause of action, failure to comply with procedural requirements under the NYCHRL, improper venue, and two defenses indicating that defendant was reserving his right to assert additional defenses. Defendant also asserts eight counterclaims: [1] discrimination based upon disability and hostile work environment in violation of the NYCHRL; [2] discrimination based upon gender and hostile work environment in violation of NYCHRL; [3] discrimination based upon perceived sexual orientation and hostile work environment in violation of the NYCHRL; [4] retaliation in violation of the NYCHRL; [5] illegal touching by "defendant Edorio"; [6] a claim that "plaintiff has been unreasonably placed in fear of immediate harm to his/her person" against plaintiff and "defendant Edorio"; [7] and two causes of action for negligent training and supervision.

Plaintiff then served a reply which "object[ed] to the defective caption and styling of Third-Party claims and submit[ted] as and for their Answer to the Counterclaims... as if correctly pleaded against Ozaniro Edoris..."

During the course of discovery in this action, plaintiff produced the District Manager for deposition, and defendant himself was deposed. The District Manager's testimony at his deposition generally corroborates plaintiff's claims. Plaintiff has also provided, *inter alia*, the affidavit of the third-party defendant, as well as various exhibits including copies of emails sent by the defendant, copies of Infraction Incident forms issued to defendant, copies of emails dated September 22, 2014 and October 6, 2014 from the District Manager to other employees at plaintiff regarding defendant's termination.

At his deposition, defendant's testimony was as follows. Defendant admitted that he was not gay, but in fact married while he worked for plaintiff. Defendant further admitted that no one at plaintiff thought he was gay. Indeed, the third-party defendant and defendant had worked together at another business called Tuck-it-Away for a period of time. While working at Tuck-it-Away, defendant admitted that the third-party defendant never harassed him. In fact, defendant and the third-party defendant were friends when they worked at Tuck-it-Away.

Defendant further testified that when he found out the third-party defendant had applied for a job with plaintiff in 2012, he told a supervisor named Christine not to hire him "[b]ecause he was a thief." The defendant had heard rumors and hearsay while at Tuck-it-Away that the third-party defendant had stolen things, but he never personally observed the alleged thefts.

Nonetheless, the third-party defendant was hired in 2012. About the alleged harassment, defendant testified as follows:

Q. And then he starts harassing you; is that right?

A. Not because of that, no.

Q. No. But you testified that the harassment began as soon as Ozzy was hired, right?

A. Within that whole year.

Q 2012?

A. Yes.

Q. And what did he do in 2012?

A. Okay. He would find things to say about me. He would talk behind my back. Things. You know. That's the way he was.

Q. He was a gossip maybe?

A. Yeah, he liked to gossip. Yeah.

Q. Do you recall what he said about you behind your back?

A. Yeah, I was a little shocked for the stuff that he said about me. Yeah.

Q. What did he say about you?

A. Like saying that I'm a faggot. I'm gay.

During his deposition, defendant testified that the third-party defendant would "moon" him and say other inappropriate things to him. Defendant, however, complained via email about a write-up from the third-party defendant to a supervisor, and in that complaint, defendant admitted that he only complained that the third-party defendant was "badger[ing]" him by writing him up.

Q. So when you wrote back to [the District Manager], right, you told him that there's a rumor you're going to get fired, right?

A. Yes.

Q. And that [the third-party defendant], whenever he feels he wants to badger you, he writes you up?

A. That's it. That's correct.

Q. There's nothing in here about him showing you his ass. There's nothing in here about him calling you gay or a faggot; is there?

A. Not in this particular paper, no.

Q. Was he doing that at that time?

A. He does it all the time.

Q. So why isn't it in here?

A. Why should you document something, especially when what you're doing is wrong? You understand? And plus, like I saying (sic), I was so embarrassed of this guy, of him constantly showing me his ass all the time, you know, it was embarrassing for him to see any documents stating that I'm writing that or this guy is show me his ass (sic). You know?

Q. But you were embarrassed when Melissa Wood yelled at you –

A. But she's a female.

Q. Let me finish. You were embarrassed when Melissa Wood yelled at you and you filed a notarized dispute?

A. She wasn't showing me her ass, which was totally different than him.

Q. So the only reason you didn't dispute is because of why?

A. Because he's a man and he's showing me his ass. And he's becoming more throwing sexual advantage at me.

...

Q. So do you know if Ozzy is gay or not?

A. I can't say that.

...

Q. So when he was showing you his ass, you never said anything?

A. No. All he said was, "let me play with you."

Q. And you just walked away; you never said anything?

A. I was a little bit embarrassed. Totally embarrassed.

Defendant was also shown two performance appraisals rating his work performance for 2011 through 2013 which were both signed by him. His 2011-2012 performance appraisal had a final score of "needs improvement" and his 2012-2013 performance appraisal, where defendant was now reporting to the third-party defendant, had a final rating of "meets expectations", which was an improvement over the prior year.

Defendant otherwise could not testify as to specifics regarding when the third-party defendant began harassing him or when he made any complaints about the alleged harassment. Defendant was also asked at his deposition about his allegation contained in the complaint that states: "Ozzy placed you in imminent fear of physical contact by approaching you with outstretched limbs and other objects that he used to physically seize, strike and restrain you." When defendant was asked if that happened, he replied: "[n]o, he didn't hit me with nothing."

Defendant further testified that he was not disabled and never considered himself disabled. Defendant admitted that he was never denied an accommodation.

Parties' arguments

Plaintiff argues that its motion must be granted because defendant is not a member of a protected calss and was never denied an accommodation. Further, plaintiff maintains that defendant's transfer was not retaliation because he was transferred away from an allegedly hostile work environment. Plaintiff contends that the assault and battery claims must be dismissed as a feigned issue of fact and that the negligent hiring, training and supervision claims are legally deficient as a matter of law.

In turn, defendant withdraws all discrimination claims based on gender, does not oppose dismissal of his disability claims to the extent they allege either a disability-based hostile work environment or termination and limits his claims to a failure to accommodate. Defendant also does not oppose the dismissal of his perceived sexual orientation claim for termination and limits the third claim to an alleged hostile work environment because of the third-party defendant's acts. Defendant opposes plaintiff's motion seeking dismissal of his retaliation claims as well as the assault and battery claims Finally, defendant opposes plaintiff's motion seeking dismissal of the negligent hiring, training, and supervision claims. Defendant also cross- moves for an order striking the third-party's answer based upon his failure to appear for a deposition.

Plaintiff maintains that the defendant waived the third-party defendant's deposition in writing and has provided copies of emails on reply.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

At the outset, the cross-motion is denied. The court finds that the defendant has waived the third-party's deposition, since he did not timely seek relief when the third-party defendant failed to appear for his deposition. In any event, an order striking the third-party defendant's complaint is not warranted on this record. Otherwise, such discovery, even if defendant was entitled to it, would not lead to a different result on this motion.

The court finds that plaintiff has met its burden on this motion and is entitled to the declaration it seeks. Plaintiff has come forward with admissible evidence establishing that defendant was not subjected to a hostile work environment nor was he discriminated against. Further, plaintiff has established that defendant was not retaliated against insofar as he was transferred to the only location with an open position and the transfer was not related to defendant's complaints. Plaintiff has also established that defendant's termination was not a form of retaliation since he was properly terminated for lateness and/or other job performance issues, and his termination was contemplated before plaintiff learned of defendant's complaints.

As for the assault and battery claims, defendant's own deposition testimony that the third-party defendant did not hit him with any object, and the court otherwise discredits defendant's claim that the third-party defendant placed him in reasonable fear of imminent harm.

Defendant's claims are self-serving and wholly unsubstantiated. Indeed, defendant's claims defy credulity, such as when he claims that he cannot pick up anything heavier than ten pounds yet testified at his deposition that he went to the gym and lifted weights. Defendant's deposition testimony was not forthright, and therefore lacks any credibility. On this record, defendant cannot raise a triable issue of fact on this record as to the alleged hostile work environment he claims existed while he worked for plaintiff.

Accordingly, plaintiff's motion is granted in its entirety.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that the motion is granted and the cross-motion is denied; and it is further

ORDERED and DECLARED that plaintiff is entitled to a declaration that defendant's employment was at-will, that defendant's transfer and termination as an at-will employee were lawful non-discriminatory business decisions, and that defendant is entitled to no relief under New York State Human Rights Law Section 296 or Section 8-107 of the New York City Human Rights Law in connection with his employment for plaintiff; and it is further

ORDERED that defendant's counterclaims are dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 1/3/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.