Coello v Riese Org. Inc.
2018 NY Slip Op 30309(U)
January 5, 2018
Supreme Court, Bronx County
Docket Number: 309073/2011
Judge: Jr., Kenneth L. Thompson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

ANGELO COELLO, ERIC GUERRERO, BENIGNO DE JESUS HENDERSON, ANTHONY HENDERSON, CARLOS VASQUEZ, JAMES WHETSTONE, and ROBERTO RIOS,

Plaintiff,

-against-

THE RIESE ORGANIZATION INC., A.R.O. CONSTRUCTION CORP., DENNIS RIESE, GARY TRIMARCHI, and ELIO MARTINI

Defendants.

X

Index No: **309073/2011**

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

The following papers numbered 1 to **108** read on this **motion for summary judgment**

No On Calendar of **August 17, 2017**	**PAPERS NUMBER**
Notice of Motion Exhibits	**1, 2, 3, 4, 5, 6, 7, 8, 16, 17, 19, 20, 22, 23 30, 31, 33, 34, 35, 36, 37, 45, 46, 48, 49, 50 51, 52, 53, 54, 62, 63, 65, 66, 67, 68, 69, 70 78, 80, 81, 82, 83, 84, 85, 86, 93, 94, 96, 97 98, 99, 100, 101**
Answering Affidavit and Exhibits	**10, 11, 25, 26, 27, 39, 40, 41, 43, 44, 56, 57, 58, 88, 89, 103, 104, 105**
Replying Affidavit and Exhibits	**13, 14, 29, 60, 61, 72,73,74, 77,91,92, 107, 108**
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	**3a, 9, 15, 18, 27, 28, 32, 38, 42, 47, 55, 59, 64, 71, 75, 79, 87, 90, 95, 102, 106**
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants move pursuant to CPLR 3212 by seven separate summary judgment motions, to dismiss the four causes of action lodged in the Second Amended Verified Complaint: first cause of action, discrimination based on race on behalf of all plaintiffs as against all defendants under New York State Human Rights Law, (NYSHRL), Executive Law 290 *et seq,* and New York City Human Rights Law, (NYCHRL), New York City Administrative Code, 8-107, second

cause of action, retaliation on behalf of all plaintiffs and against all defendants under both the NYSHRL and NYCHRL, third cause of action, hostile workplace on behalf of all plaintiffs against all defendants under NYSHRL and NYCHRL, and the fourth cause of action for intentional infliction of Emotional Distress on behalf of plaintiffs, Angelo [Mike] Coello, (Coello), Benigno De Jesus Encarnacion, (Encarnacion), Anthony Henderson, (Henderson), Carlos Vasquez, (Vasquez), and James Whetstone, (Whetstone), against defendant Martini only. The seven plaintiffs worked together on the same construction sites and under the same managers. The seven plaintiffs are black and/or Hispanic. The seven motions are hereby consolidated for purposes of decision and disposition.

The seven plaintiffs worked for defendant, A.R.O. Construction Corp., (ARO). ARO is in the business of providing maintenance and construction services. Defendant, The Riese Organization Inc., (Riese Organization), is the parent company of ARO. Defendant, Dennis Riese, (Riese), is the chairman of the board and CEO of Riese Organization and its subsidiary, ARO. Defendant, Gary Trimarchi, (Trimarchi), is the president of ARO. Defendant, Elio Martini, (Martini), is the direct supervisor of the plaintiffs.

The lead plaintiff, Coello, was a supervisor; the other six plaintiffs are Eric Guerrero, (Guerrero), was a laborer; Encarnacion, was a plumber; Vasquez was a laborer; Robert Rios, (Rios), was a plumber; Whetstone is a driver; Henderson was a plumber. Henderson is the only one of the seven plaintiffs, currently employed by ARO. All plaintiffs except Henderson are claiming wrongful termination, among other claims.

COELLA

With respect to discrimination based on race, plaintiff submitted an affidavit and report of Dr. Alan Moss, (Dr. Moss), an economist who specializes in the labor market and forensic evidence. Dr. Moss found that the plaintiffs' average hourly wage as compared to the market hourly wage median has a shortfall of almost $9.00 per hour. This compares to a shortfall for white employees for whom there was a wage shortfall of $3.44 per hour. Furthermore, the white employees who had an hourly wage above the median rates had an average hourly surplus of $9.11. The plaintiffs earned an average of 73 percent of the median hourly market wage and whites earned an average of 126 percent of the median hourly market wage. Coello's average shortfall was the least in 2009 at $6.92 and the greatest in 2014, at $10.65. Furthermore, Coello testified to numerous discrepancies between the wages of white and non-white workers including the discrepancy between his wages and a white carpenter, Richie Ernst, (Ernst). Coello testified to having many more skills than Ernst and the record reflects that Ernest was paid a substantially greater wage. Furthermore, Coello avers to stark unfavorable comparisons for the work skills of the white employees as compared to the superior work skills of the black and Hispanic employees.

With respect to retaliation claims:

> To make out a claim of retaliation under the State HRL, the complaint must allege that (1) [Plaintiff] engaged in a protected activity by opposing conduct prohibited thereunder; (2) defendants were aware of that activity; (3) he was subject to an adverse action; and (4) there was a causal connection between the protected activity

> and the adverse action (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004])
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> ...
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> [T]o make out a retaliation claim under the City HRL, the complaint must allege that: (1) [Plaintiff] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged him; and (3) a causal connection exists between the protected activity and the adverse action (*see Albunio v City of New York*, 67 AD3d 407, 413 [2009], *affd* 16 NY3d 472 [2011]).[2]
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> *Fletcher v. Dakota, Inc.*, 99 A.D.3d 43, 51–52 [1st Dept 2012]).

Shortly after filing this lawsuit on October 12, 2011, Coello was indefinitely suspended on November 30, 2011 for not promptly reporting the loss of keys to restaurants. Coello testified that others had lost keys and delayed reporting the loss without being suspended. Coello argues the layoffs fell disproportionately on black and Hispanic employees, one white employee was laid off while six of the seven plaintiffs were laid off. While defendants argue that the lay-offs occurred for economic reasons, Coello avers that being the second in command to Martini, he was aware of many of the details of the business and he was not aware of any significant changes in business operation that would require layoffs

Coello testified that after the lawsuit was filed the white employees were "going crazy," making comments about "this fucking guy, fucking piece of shit, and cursing." (transcript p. 617).

Coello avers that he informed management of the racial discrimination in four ways: communication with Martini, grievance meetings with Martini and black and Hispanic employees, general staff meetings with Martini and two attempted grievance meetings with Trimarchi in which he did not appear but his

secretary appeared in Trimarchi's place and took notes to convey them to Trimarchi. Coello avers that he conveyed the language that Martini used in supervising black and Hispanic employees such as "monkey," "idiot," "stupid," "knucklehead," and "fuck." Coello further avers that Martini did not use such language in speaking to white employees.

Coello avers that many of the white employees had issues with punctuality and attendance, and were permitted to smoke, drink and skip days at work. Coello observed that none of the black and Hispanic employees were allowed such privileges. Coello further avers that less desirable work was assigned to black and Hispanics. Such assignments included demolition work, unprotected work with asbestos, work with sewage, unprotected work in spaces with bedbugs, heavy lifting, rubbish removal and clean-up, work in unheated work spaces as well as potentially life-threatening work around live electrical wires.

To sustain a NYSHRL hostile workplace claim, plaintiffs must show that the "workplace was 'permeated with "discriminatory intimidation, ridicule and insult" that [was] "sufficiently severe or pervasive to alter the terms or conditions of [his] employment,""" so as to make out a claim for hostile work environment (*Ferrer v New York State Div. of Human Rights*, 82 AD3d 431 [2011], quoting *Harris v Forklift Systems, Inc.*, 510 US 17, 21 [1993])." *Mejia v. Roosevelt Island Med. Assocs.*, 95 A.D.3d 570, 573 [1st Dept 2012]). In the case at bar there is evidence that the work environment had more than """isolated remarks or occasional episodes of harassment [that] will not support a finding of a hostile or abusive work environment" (*see Matter of Father Belle Community Ctr. v New York State*

Div. of Human Rights, 221 AD2d 44, 51 [1996], *lv denied* 89 NY2d 809 [1997] [citations omitted])." *Ferrer v. New York State Div. of Human Rights*, 82 A.D.3d 431 [1st Dept 2011]).

With respect to the hostile workplace Coello testified that a white foreman, Richard Ernst, (Ernst), would make derogatory racial comments toward Coello calling him "Pedro" or "Julio" knowing that his nickname was Mike and Ernst called all Hispanics, "Mexican." He used the term "fucking useless" to describe minority workers.

Ernst's behavior was documented in a "Notice of Poor Performance" dated August 13, 2010, in which his use of the term, "sand nigger," was addressed. He was further cited for sleeping on the job, failure to complete work, excessive use of the cell phone, drinking alcohol on the job, and using company vehicles for personal purposes. Coello avers that after the Notice was given to Ernst, Ernst continued to engage in such conduct. No punishment was given to Ernest in sharp contrast to the indefinite suspension that lasted three weeks that was meted out to Coello for not timely reporting the loss of his work keys.

Riese, the CEO of Riese Organization and ARO, testified as follows: "That word [nigger] is being used constantly in our society, including by black people who seem to use it more often than white people these days. When a white person uses it in a conversation with them, they cry discrimination. That doesn't seem fair... I am not convinced that the use of that word really means discrimination anymore. I really don't." (transcript p. 200-201). Subsequently, Riese testified that the context will govern whether the use of the term "nigger" by a white person

is discriminatory.

It cannot be held as a matter of law that Coello has failed to raise an issue of fact with his testimony and other evidence with respect to discrimination based on race, retaliation and hostile workplace, under both the NYCHRL and NYSHRL. On a summary judgment motion the "court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility." *(Dauman Displays Inc. v. Masturzo*, 168 AD2d 204 [1st Dept. 1990]). "It is settled that the function of a court on a motion for summary judgment is issue finding, not issue determination." *(Clearwater v. Hernandez*, 256 AD2d 100 [1st Dept. 1998]).

With respect to the application of Riese Organization to be dismissed from this action, Coello avers that he was sent a letter of employment from the Riese Organization, provided business cards with the Riese Organization name on it, issued an anti-harassment policy document labeled "The Riese Organization." There is no evidence that the Riese Organization did not exercise dominion and control over ARO and the plaintiffs and was aware of the practices alleged by plaintiff.

With respect to the applications of the individual defendants to dismiss the complaint as against them, "("[E]mployees may be held personally liable under the [NYS]HRL and the NYCHRL" if they participate "in the conduct giving rise to a discrimination claim."). We therefore find that the claims against the named individual defendants may proceed under the NYCHRL for the same reasons that

they may under the NYSHRL." *Feingold v. New York*, 366 F.3d 138, 158–59 [2d Cir. 2004]). It cannot be held as a matter of law that the individual defendants did not participate in the conduct that gave rise to the discrimination claims herein.

With respect to the Intentional infliction of emotional distress claims:

> [O]f the intentional infliction of emotional distress claims considered by this Court, everyone has failed because the alleged conduct was not sufficiently outrageous (*see, Freihofer v. Hearst Corp.,* 65 N.Y.2d, at 143–144, 490 N.Y.S.2d 735, 480 N.E.2d 349; *Burlew v. American Mut. Ins. Co.,* 63 N.Y.2d 412, 417–418, 482 N.Y.S.2d 720, 472 N.E.2d 682; *Murphy,* 58 N.Y.2d, at 303, 461 N.Y.S.2d 232, 448 N.E.2d 86; *Fischer v. Maloney,* 43 N.Y.2d, at 557, 402 N.Y.S.2d 991, 373 N.E.2d 1215). "'Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community'" (*Murphy,* 58 N.Y.2d, at 303, 461 N.Y.S.2d 232, 448 N.E.2d 86, quoting Restatement [Second] of Torts § 46, comment *d).*

Howell v. New York Post Co., 81 N.Y.2d 115, 122 [1993]).

While the evidence submitted in opposition to the motions herein creates issues of fact regarding plaintiff's other claims, the facts are not sufficiently outrageous as outlined by the Court of Appeals in *Howell*. "("Acts which merely constitute harassment, disrespectful or disparate treatment, a hostile environment, humiliating criticism, intimidation, insults or other indignities fail to sustain a claim of [Intentional infliction of emotional distress] because the conduct alleged is not sufficiently outrageous.")." *Stevens v. New York*, 691 F. Supp. 2d 392, 399 [S.D.N.Y. 2009]).

Accordingly, with respect to Coello, the summary judgment motion to

dismiss is granted to the extent that Coello's claim for intentional infliction of emotional distress is dismissed. Otherwise the motion is denied.

ENCARNACION

On May 5, 2014, Encarnacion filed for bankruptcy. Encarnacion listed this lawsuit with the accurate caption and index number but with an inaccurate characterization of this lawsuit as a claim for lost wages rather than discrimination, hostile workplace, retaliation and intentional infliction of emotional distress. Defendants argue that Encarnacion concealed this action from the Trustee in Bankruptcy by mis-labeling the action. However, the "[debtor's] listing was not so defective that it would forestall a proper investigation of the asset." *Cusano v. Klein*, 264 F.3d 936, 946 [9th Cir. 2001]). With the proper caption and index number this action was capable of being investigated. Therefore, the asset was disclosed with enough information to facilitate "a proper investigation of the asset." *Id.*

The applicable aforementioned and following evidence and law applies to Encarnacion's claims as all plaintiffs worked at the same sites and under the same supervisors.

Encarnacion testified that Martini would call him a "fucking Hispanic" and a "pig" and "fucking fat guy." Encarnacion that Martini would not use such language with the white employees. Encarnacion testified to being suspended from work for a brief visit to Victoria's Secret, while white employees were allowed to come and go on the job site without any consequences. Encarnacion testified to being suspended for actions that would not draw suspensions by white

employees.

Accordingly, with respect to Encarnacion's claims the summary judgment motion to dismiss is granted to the extent that Encarnacion's claim for intentional infliction of emotional distress is dismissed. Otherwise the motion is denied.

GUERRERO

The applicable aforementioned and following evidence and law applies to Guerrero's claims as all plaintiffs worked at the same sites and under the same supervisors.

Guerrero testified that Ernest would call him a "spic, little girls, you little bitches." (transcript, p. 64). Guerrero testified to the disparity in treatment between whites and non-whites while on the job, including that only black and Hispanics worked on weekends, cleaned up garbage, worked with raw sewage, cleaned up after white employees. Guerrero testified that Martini obstructed black and Hispanic employees from obtaining tools or needed materials while white employees received the tools and materials they needed. Guerrero testified that whites could have cigarette breaks but not black and Hispanic employees. White employees could leave work early but not black and Hispanic employees. Guerrero and the other employees' complaints about the discriminatory behaviors are very similar.

It is noted that Guerrero did not lodge an intentional infliction of emotional stress claim.

Accordingly, the motion for summary judgment is denied with respect to Guerrero.

HENDERSON

The applicable aforementioned and following evidence and law applies to Henderson's claims as all plaintiffs worked at the same sites and under the same supervisors.

Henderson testified that Martini would call him and other black and Hispanic employees, "motherfucker," "piece of shit" and "fucking ignorant," but would not address white employees that way. Henderson testified that Martini was not joking when he used such language with black and Hispanic employees. Henderson testified that black and Hispanic employees were given undesirable work such as working in the presence of sewage, asbestos, cockroaches and bedbugs. In summary, Henderson further testified to extensive preferential treatment of white employees as compared to black and Hispanic employees.

Accordingly, with respect to Henderson's claims, the summary judgment motion to dismiss is granted to the extent that Henderson's claim for intentional infliction of emotional distress is dismissed. Otherwise the motion is denied.

RIOS

The applicable aforementioned and following evidence and law applies to Rios' claims as all plaintiffs worked at the same sites and under the same supervisors.

Rios testified to Martini calling black and Hispanic employees "monkeys." Rios further testified that Martini called Rios' cigarettes "gorilla mints." Rios testified that Martini would ask Rios to speak with Encarnacion by saying "talk to this fucking guy, because I can't fucking understand him with his fucking

Spanish." (Transcript p. 86). Rios said Martini never used such language with white employees. Rios also testified to the same discriminatory work assignments as stated hereinabove.

Accordingly, with respect to Rios' claims, the summary judgment motion to dismiss is denied.

VASQUEZ

The applicable aforementioned and following evidence and law applies to Vasquez' claims as all plaintiffs worked at the same sites and under the same supervisors.

Vasquez avers that "Martini would refer to "these fucking Spanish" and say, "you don't speak English" in an angry, aggressive threatening manner." (affidavit, par. 11). Vasquez further avers Martini never spoke with white employees with profanity. Vasquez further avers that when the black and Hispanic employees met with Martini, to address the disparity in treatment between white and black and Hispanic employees, Martini at several of these meetings told the gathered black and Hispanic employees to leave the company if they were unhappy with their jobs. (affidavit, par. 6). Vazquez also testified to the same discriminatory work assignments as stated hereinabove.

Accordingly, with respect to Vasquez, the summary judgment motion to dismiss is granted to the extent that Vasquez' claim for intentional infliction of emotional distress is dismissed. Otherwise the motion is denied.

WHETSTONE

The applicable aforementioned evidence and law applies to Vasquez' claims as all plaintiffs worked at the same sites and under the same supervisors.

Whetstone avers that he attended meetings with Martini and other black and Hispanic employees, that aired the complaints about Martini's conduct toward black and Hispanic employees and his discriminatory assignments to black and Hispanic employees. Whetstone further avers to Martini's verbal abuse exclusively towards black and Hispanics, and the preferential treatment of white employees over black and Hispanic employees. Whetstone avers to having to remove garbage from job sites that have asbestos or bedbugs without protective gear. Whetstone observed that only black and Hispanic employees were assigned to asbestos removal and to work in locations with bedbugs.

Whetstone was allegedly terminated for his language used toward Martini and Trimarchi during a suspension meeting. Defendants argue that as a result, Whetstone's retaliation claim should be dismissed. However, Whetstone testified to discriminatory write-ups and suspensions that occurred after the lawsuit was filed, for behavior that had never led to a write-up or suspension before the lawsuit was filed. Whetstone avers to a different version of the suspension meeting with Trimarchi and Martini than averred to by defendants. Whetstone, avers that after receiving an indefinite suspension he muttered "asshole" under his breath. In response, Trimarchi ran over to him "in a threatening manner and screamed "suck my dick!"" to Whetstone. (affidavit, par. 16).

Accordingly, with respect to Whetstone's claims the summary judgment

motion to dismiss is granted to the extent that Whetstone's claim for intentional infliction of emotional distress is dismissed. Otherwise the motion is denied.

CONCLUSION

While the plaintiffs' testimony and averments are largely controverted by defendants' testimony and averments, on a summary judgment motion the "court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility." *(Dauman Displays Inc. v. Masturzo*, 168 AD2d 204 [1st Dept. 1990]). "It is settled that the function of a court on a motion for summary judgment is issue finding, not issue determination." *(Clearwater v. Hernandez*, 256 AD2d 100 [1st Dept. 1998]).

Accordingly, defendants' motions are granted to the extent that the fourth cause of action for intentional infliction of emotional distress is dismissed. Otherwise, the motion is denied.

The foregoing constitutes the decision and order of the Court.

Dated: 1/5/2018

KENNETH L. THOMPSON JR. J.S.C.