Brock v Amazon Prime
2022 NY Slip Op 33153(U)
September 19, 2022
Supreme Court, New York County
Docket Number: Index No. 100841/2020
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHLOMO S. HAGLER** **PART** **17**

Justice

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MANDELA T. BROCK,

Plaintiff,

- v -

AMAZON PRIME, JEFF BEZOS, ALEX MARTIN LOPEZ

Defendant.

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INDEX NO. 100841/2020

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 9, 10, 11, 12 were read on this motion to/for DISMISSAL.

This action arises out of plaintiff Mandela T. Brock's claims that defendants Prime Now, LLC s/h/a Amazon, Prime Now LLC ("Prime Now"), Jeff Bezos, Alex Martin Lopez ("Lopez") (together referred to as the "Amazon Defendants") and Melissa D. Hill and Liliya P. Kramer (the "Morgan Lewis Defendants") (collectively, the "defendants") wrongfully terminated him and subjected him to discrimination, a hostile work environment and retaliation on account of his disability of alcoholism in violation of state laws, including the New York State Labor Law. Defendants move, pursuant to CPLR 3211 (a) (7), for an order dismissing the Amended Complaint. For the reasons set forth below, defendants' motion is granted.

PROCEDURAL HISTORY

This action is on remand from the Southern District of New York, which after dismissing all of plaintiff's federal claims, declined to exercise supplemental jurisdiction over plaintiff's remaining state law claims.

By Report and Recommendation, dated August 26, 2021, Magistrate Judge Ona T. Wang (SDNY) recommended dismissal of all federal claims asserted by plaintiff against the Amazon Defendants and the Morgan Lewis Defendants (*Brock v Prime Now LLC,* 2021 WL 4267849 [SDNY Aug. 26, 2021]). As is relevant herein, Magistrate Judge Wang found that plaintiff failed to state a cause of action for employment discrimination under the Americans with Disabilities Act [42 USC § 12101 *et seq.*] ("ADA"), failed to sufficiently plead retaliation under the ADA, and failed to adequately plead claims under the federal Racketeer Influenced and Corrupt Organizations Act [18 USC §§ 1961-68] ("RICO"). On September 19, 2021, United States District Judge Valerie Caproni adopted the Report and Recommendation in its entirety (*Brock v Prime Now LLC*, 2021 WL 4267380 [SDNY Sept 19, 2021]).

The Amended Complaint asserted a total of fifteen causes of action, and based on the federal court's dismissal of the federal causes of action, nine causes of action remain. Those causes of action are disability discrimination and/or failure to accommodate under state law (First Cause of Action), violations of New York Labor Law (second and third causes of action); violations of the New York Penal Law (fourth cause of action), hostile work environment (fifth cause of action), slander and libel (sixth and seventh causes of action), breach of contract (eighth cause of action) and bearing false witness (ninth cause of action).

BACKGROUND AND FACTUAL ALLEGATIONS

Reference is made to the detailed and comprehensive District Court Report and Recommendation (*Brock v Prime Now LLC* [2021 WL 4267849 [SDNY Aug. 26, 2021]). Plaintiff worked for defendant Prime Now, a wholly owned subsidiary of Amazon.com LLC, as a Whole Foods Shopper between May and August of 2020 (*Id.* at *1). Prime Now had a safety policy that prohibited employees from wearing headphones while shopping and packing.

There were two of plaintiff's behaviors that defendant Alex Martin Lopez ("Lopez"), plaintiff's supervisor, flagged as violating Prime Now and Amazon policies – that plaintiff violated a Prime Now safety policy that prohibits the use of headphones while working and that plaintiff violated Amazon's Time Off Task Guidelines. The Amended Complaint contends that prior to receiving any warnings about headphone use, plaintiff spoke with Lopez "in private, concerning his, plaintiff's, disability and the need to listen in and or participate in Alcoholics Anonymous [("AA")] meetings and Rehabilitation Groups to maintain sobriety" (Amended Complaint ¶ 11). Plaintiff further contends that although he then refrained from wearing headphones while shopping, "thereafter ensured [*sic*] a pattern of denial of the right to work with a disability in violation of lawful procedures and regulations thereby creating a hostile work environment" (Amended Complaint ¶ 13). Plaintiff also alleges that he informed Lopez that he was off task/unavailable due to the system "timing out without consent" (Amended Complaint ¶¶ 20, 21).

In the Amended Complaint, the only cause of action that could arguably be applicable to the Morgan Lewis Defendants is the Ninth Cause of Action for bearing false witness, which is

pled against all individual defendants.[1] Plaintiff alleges that defendants "willfully and intentionally [bore] false witness against the plaintiff."

The description of the warnings issued by defendants regarding plaintiff's headphone use, are aptly set forth in the District Court Report & Recommendation as follows:

> "In June 2020, Lopez warned Plaintiff three times that using headphones while working was in violation of Prime Now's policy. See Am. Compl. Exs. A (June 23, 2020 warning), B (June 29, 2020 warning), and D (June 30, 2020 warning). The warnings stated that wearing headphones violated company policy because Plaintiff's role was 'customer facing[,] and having headphones on can pose [a] safety hazard and poor customer experience.' Am Compl. Ex. A [footnote omitted]. Each warning included written supportive feedback that stated he was not meeting 'Behavioral expectations,' which was a 'critical component' of his job. *Id.* The June 23, 2020 and June 29, 2020 warnings stated that Plaintiff was expected to follow 'Amazon.com's Safety Standards of Conduct' at all times to ensure a 'safe work environment,' and '[f]urther violations of these standards may result in further corrective action, up to and including termination.' *Id.* The 'Areas of Improvement Required' by Plaintiff in his final June 30, 2020 warning similarly stated that Plaintiff must be aware of his surroundings for safety purposes, but also separately stated that he had failed to: (1) act as a team player, (2) follow instructions of his leadership team; and (3) communicate to his leadership team in a respectful manner in the event he cannot follow instructions. *See* Am. Comp. Ex. D. For each incident, Plaintiff was observed shopping while wearing headphones" (*Brock*, 2021 WL 4267849 *1).

With respect to defendants' termination of plaintiff as a result of plaintiff's violation of Amazon's Time Off Task Guidelines, the District Court Report & Recommendation provides:

> "On August 5, 2020, Defendant Lopez emailed Plaintiff asking why he had been unavailable for over two hours during his August 3, 2020 shift. Am Comp. Ex. [E]. Plaintiff stated that '[t]he system be timing out without consent and putting a shopper as unavailable on its own and I forgot to check it periodically so as to refresh it! This is a constant system error that many shoppers experience.' Am. Compl. Ex. F. Plaintiff was terminated on August 9, 2020 for violating Amazon's Time Off Task ('TOT') Guidelines on August 3, 2020. Am. Compl. Ex. G" (*Id.* at *2) [footnotes omitted].

[1] Although the allegation is seemingly against the individual defendants, plaintiff alleges that by reason of this breach, "defendants" caused damage to plaintiff.

DISCUSSION

Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211 (a) (7), "the facts as alleged in the complaint [are] accepted as true, the plaintiff is accorded the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory" (*Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007]). However, "[a]lthough on a motion to dismiss[,] plaintiff's allegations are presumed to be true and accorded every favorable inference, conclusory allegations-claims consisting of bare legal conclusions with no factual specificity-are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009] *citing Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]; *see Askin v Department of Educ. of the City of N.Y.,* 110 AD3d 621, 622 [1st Dept 2013] [motion to dismiss granted finding that plaintiff's allegations of employment discrimination "amount to mere legal conclusions"]).

Any cause of action against defendant Jeff Bezos

The Amended Complaint is devoid of any specific allegation as against Jeff Bezos ("Bezos") in the remaining state causes of action (other than a reference to Bezos as a named defendant) (*see Doe v Bloomberg L.P.,* 178 AD3d 44, 51 [1st Dept 2019] [discrimination claims against Michael Bloomberg dismissed based on lack of allegations against him, and there being no allegations that he had "any involvement or interactions" with the plaintiff therein]). As such, to the extent that the state causes of action are deemed to make claims against Bezos, such claims are dismissed.

Discrimination Claims based on Disability

As an initial matter, this Court notes that plaintiff alleges that defendants' conduct violated his rights under New York State laws without specifically alleging violations of the New York State Human Rights Law ("NYSHRL") [Executive Law § 290 et seq.]. However, because plaintiff must be accorded every favorable inference, this Court will deem his imprecise allegations of discrimination (including hostile work environment and retaliation) as asserting claims under the NYSHRL.

NYSHRL prohibits an employer from discriminating against an individual because of a disability [Executive Law § 296 (1) (a)]. The District Court's findings and conclusions in dismissing this action under the ADA are equally germane to plaintiff's remaining state causes of action for discrimination under the NYSHRL. The District Court found:

> Plaintiff does not adequately allege that he suffers from a disability, because he failed to assert facts that his alleged alcoholism interferes with his ability to work (*Brock*, WL 4267849 *5);
>
> Plaintiff does not adequately plead that defendants failed to accommodate his disability given plaintiff does not adequately plead he is a person with a disability in the first place (*Id.* at *7).

The District Court's finding that plaintiff failed to allege a disability applies equally to plaintiff's allegations seemingly made under the NYSHRL. The District Court noted:

> "At most, Plaintiff alleges that he must participate in AA meeting to maintain sobriety, and that Defendants forbade him from participating in AA meetings while working his scheduled shifts. Plaintiff does not allege specific facts that his alcoholism interferes with his ability to work; rather Plaintiff alleges that his preferred treatment plan of his purported alcoholism interferes with his ability to work" (*Id.* at *5).

Most significantly, plaintiff fails to allege that an adverse employment action occurred because of his purported disability. The District Court noted:

> "Plaintiff does not adequately allege that his termination was *because of* his disability. Plaintiff alleges facts related to his desire to wear headphones to participate in AA meetings during shifts and attaches warnings from June 2020 [to the Amended Complaint] in which he was reprimanded for doing so. Separately, Defendants terminated Plaintiff's employment on August 9, 2020, because he was 'off task' for over two hours, in violation of TOT Guidelines. Plaintiff does not allege that his being off task was at all related to his disability, or even that his use of headphones was the reason for why he was off task. Instead, Plaintiff argues that Prime Now's system erroneously marked him as off task. This explanation does not connect Plaintiff's termination to his disability" (*Id.* at *6) [references to Amended Complaint Exhibits omitted].

As such, plaintiff's Amended Complaint "fails to state a cause of action for employment discrimination under the NYSHRL because it does not contain any factual allegations showing that plaintiff's employment was terminated under circumstances giving rise to an inference of discrimination" (*Brown v City of New York*, 188 AD3d 518, 518 [1st Dept 2020]. Plaintiff's allegations herein that defendants' termination of his employment was somehow connected to his purported alcoholism "amount to mere legal conclusions" and consequently do not adequately plead that plaintiff was terminated under circumstances giving rise to an inference of discrimination (*Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]).

Any Claim for Retaliation or Hostile Work Environment

To the extent that plaintiff's Amended Complaint can be deemed to allege retaliation or hostile work environment causes of action under the NYSHRL, those claims fail. To sustain a claim for retaliation, a plaintiff must show that (1) [he] has engaged in a protected activity, (2) [his] employer was aware of such participation, (3) [he] suffered from an adverse employment

action based upon [his] activity, and (4) there is a causal connection between the protected activity and the adverse action taken by [his] employer" (*Forrest v Jewish Guild for Blind*, 309 AD2d 546, 558 [1st Dept 2003] aff'd 3 NY3d 395 [2004]). Although plaintiff refers to retaliation in a conclusory manner, he fails to allege any protected activity, what actions were retaliatory or how there is any causal connection between a protected activity and any adverse employment action.

Likewise, plaintiff makes conclusory references to hostile work environment without setting forth any supporting facts. Plaintiff's allegations "f[a]ll short of alleging that the workplace was permeated with discriminatory intimidation, ridicule, and insult…that [was] sufficiently severe or pervasive to alter the conditions of…employment and create an abusive working environment" (*Pall v Roosevelt Union Free Sch. Dist.*, 144 AD3d 1004, 1005 [2d Dept 2016] [internal quotations and citation omitted]).

Plaintiff's claims under Labor Law § 740

Although not specifically alleged in the Amended Complaint, plaintiff's claim is construed to be made under Labor Law § 740 (2) (a) which prohibits an employer to take any retaliatory action against an employee who discloses to a supervisor or public body "an activity or practice of the employer that the employee reasonably believes is in violation of law, rule or regulation or that the employee reasonably believes poses a substantial danger to the public health or safety[.]"[2] There is absolutely no allegation in the Amended Complaint that plaintiff engaged in such whistleblower activity, and as such, plaintiff's Labor Law § 740 claims fail.

[2] Labor Law § 740 (2) is "triggered only by a violation of law, rule or regulation that creates and presents a substantial and specific danger to the public health and safety" (*Tomo v Episcopal Health Servs., Inc.*, 85 AD3d 766, 768 [2d Dept 2011]). Clearly, plaintiff fails to satisfy this element.

Plaintiff's Claim under New York Penal Law

Plaintiff's claim under the New York Penal Law is devoid of merit. Plaintiff cannot assert a criminal claim under the New York Penal Law in a civil action.

Plaintiff's Claims for Slander and Libel

Plaintiff merely alleges that "Lopez did transmit false and slanderous information to third parties that damaged plaintiff's reputation, loss of financial opportunities, loss of employment and sustained personal injuries" (Amended Complaint, Seventh Causes of Action; see also Sixth Cause of Action). Plaintiff utterly fails to allege with any specificity what statements were made, that the statements were published and whether the statements were false [CPLR § 3016 (a)] ["In an action for libel or slander, the particular words complained of shall be set forth in the complaint"]. Plaintiff must set forth "the particular words that were said, who said them and who heard them, when the speaker said them, and where the words were spoken" (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 48 [1st Dept 2009] *lv dismissed in part, denied in part* 14 NY3d 736 [2010]; *see generally Savitt v Cantor*, 189 AD3d 468 [1st Dept 2020] [granting motion to dismiss slander and libel per se]; *Fedrizzi v Washingtonville Cent. School Dist.*, 204 AD2d 267 [2d Dept 1994] [words not published to third persons].

Plaintiff's Claim for Breach of Contract

The Eighth Cause of Action in the Amended Complaint alleges that the individual defendants willfully and intentionally breached a contract "they had with the State of New York and plaintiff that they would follow the employment laws of the State of New York." A breach

of contract cause of action cannot be maintained where, as here, there is no contract between the parties (*see generally Landmark Ventures, Inc. v InSightec, Ltd.*, 179 AD3d 493, 494 [1st Dept 2020] [the document at issue was not a contract pursuant to which defendant had any obligations to plaintiff]).

Plaintiff's Claim for Bearing False Witness

This claim is entirely conclusory, and without any basis in law or fact. As such, such cause of action must be dismissed against all defendants, including the Morgan Lewis Defendants.

Plaintiff's Opposition

Plaintiff's opposition introduces new arguments which are not part of the Amended Complaint. For example, plaintiff asserts for the first time that the reason for his termination (violation of the Time Off Task Guidelines) was pretextual and that he was instead terminated because of his disability. In support, plaintiff refers to minor differences in the language of the subject warnings.[3] Plaintiff also asserts for the first time that the Prime Now policy prohibiting headphones while working was an Amazon warehouse policy that did not apply to him. Moreover, plaintiff admits that he did not engage in whistleblowing activity in connection with his Labor Law §740 claims. Finally, plaintiff fails to oppose or respond to several of defendants' arguments in support of the instant motion such as those related to claims under the New York Penal Code, and for slander and libel. As such, plaintiff's reply fails to change this Court's determination.

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[3] Plaintiff takes issue with the use of the phrase "shopping" in the first and second warning compared to "shopping/packing", used in the third warning. This minor change in language is insufficient to show discriminatory intent or that his termination for violating the time off guidelines was pretextual.

CONCLUSION

On the basis of the foregoing, it is

ORDERED, that defendants' motion to dismiss is granted in its entirety.

The Clerk shall enter judgment accordingly.

9/19/2022
DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE