

Clendenin v VOA of Am. - Greater N.Y. Inc.

2022 NY Slip Op 34561(U)

February 22, 2022

Supreme Court, Bronx County

Docket Number: Index No. 33475/2018E

Judge: Kim Adair Wilson

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK : Part IA-12

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MURRAY CLENDENIN,

Plaintiff,
-against-

VOA OF AMERICA – GREATER NEW YORK INC.,
d/b/a VOLUNTEERS OF AMERICA,
SANFORD LEWIS, and BRIAN BARDELL,
Defendants.

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Kim Adair Wilson, J.:

DECISION AND ORDER
Index No. 33475/2018E
Motion Seq. #001

HON. KIM ADAIR WILSON
J.S.C.

“**NOTICE OF MOTION**,” dated and filed November 3, 2021, respectively, by Richard S. Finkel and Jessica C. Moller, Esqs. (Bond, Schoeneck & King, PLLC), attorneys for defendants, seeks an “order pursuant to CPLR 3212 granting Defendants motion for summary judgment and granting such other relief, including costs, as this Court deems just and proper.” Submitted in opposition to defendants’ motion is “**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**,” dated and filed December 3, 2021, respectively, by Ishan Dave, Esq. (Derek Smith Law Group, PLLC), attorney for plaintiff. In return, defendants’ attorneys submit “**DEFENDANTS’ REPLY MEMORANDUM OF LAW IN SUPPORT OF SUMMARY JUDGMENT**,” dated and filed December 9, 2021, respectively.

Plaintiff Clendenin commenced the instant action, asserting, in substance, that he was employed by the defendants as Project Manager of the Wales Avenue Housing LP and Creston Avenue Resident LP (“subject premises”), a “low-income housing tax credit development” and “a permanent supportive housing facility that provides behavioral health services to individuals with mental illness”, respectively, from January 2017 to May 2018. During that time, he complained of the uninhabitable and dangerous conditions in and about the subject premises and how they created a substantial risk to public health and safety. As a result, plaintiff posits that, in May 2018, the defendants, in retaliation, terminated him from his employment, which is a violation of New York Labor Law § 740.

Now, in the instant action, defendants VOA-Greater New York Inc., d/b/a Volunteers of America, Sandford Lewis, and Brian Bardell (“VOA, Lewis and Bardell”) move for CPLR 3212 summary judgment dismissal of plaintiff’s complaint on the basis that 1) plaintiff’s claim fails because he cannot identify or prove an actual violation of law by defendants; 2) plaintiff has not identified a violation of law by defendants that presented a specific danger to the public health or safety; 3) the defendants are entitled to summary judgment; and 4)

further discovery will not lead to relevant evidence. Defendants' counsel further asserts, by affirmation, that plaintiff, in his response to defendants' interrogatories, did not identify a law, rule or regulation allegedly violated by defendants.

In support of their motion, defendants VOA, Lewis and Bardell submit the respective affidavits of Sean Prendergast (Vice-President of Human Resources and Chief Compliance Officer for VOA-GNY) and Paul Kress (Vice-President of Real Estate for VOA-GNY). Mr. Prendergast confirms plaintiff's employment and plaintiff's receipt of VOA's Employee Handbook. He also states that defendant Lewis was a Program Director at the Creston Avenue Residence and Defendant Bardell served as Assistant Vice President of NYC Specialized Housing and Veterans Initiatives; and only VOA's President/CEO, Vice-Presidents and Assistant Vice-Presidents possessed the authority to hire or fire employees. Mr. Kress attests that prior to his current position, he served as Vice-President of Strategic Initiatives from July 1, 2015 to June 30, 2020. He hired Mr. Clendenin and subsequently terminated him for "performance reasons" and stated same in an annexed "Corrective Action Memorandum."

In opposition, plaintiff Clendenin submits that he was terminated because he informed the defendants on different occasions about the uninhabitable premises and unstable and violent tenants. He complained of rapes and physical assaults between tenants and the dangers posed to the physical safety of the staff and the public at large and defendants failed to take any action or preventative measures. Moreover, plaintiff's counsel states that the defendants' motion is premature. On November 14, 2019, the Honorable Laura Douglas set forth discovery deadlines. Between September 27, 2021 and October 11, 2021, he and defendants' counsel were involved in e-mail exchanges attempting to schedule depositions of the plaintiff, Ms. Lewis and Mr. Bardell. Plaintiff's counsel followed up on October 14, 2021 and October 19, 2021. In fact, plaintiff's counsel contends that they "agreed to complete discovery prior to contacting the court for an updated scheduling order." On October 19, 2021, however, defendants' counsel informed plaintiff's counsel that they are not producing defendants Lewis and Bardell for depositions.

DISCUSSION

It is well settled that summary judgment is a drastic remedy which can only be granted when it is clear that there are no triable issues of fact (*Middle Village Associates v Pergament Home Centers, Inc.*, 184 Misc2d 552 [2000], quoting *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986] or where the issue is even debatable (*Stone v Goodson*, 200 NYS2d 627 [1960])). A party, however, cannot avoid summary judgment based on speculation that the depositions of parties may uncover something (*Pane v Cisilino*, 144 AD3d 567 [1st Dept 2016]; *W&W Glass Systems, Inc. v Admiral Insurance Company*, 91 AD3d 530 [1st Dept 2012]).

An evidentiary basis for his or her suggestion that discovery may lead to relevant evidence must be presented (*Progressive Northeastern Insurance Company v Penn-Star Insurance Company*, 89 AD3d 547 [1st Dept 2011] citing *Bailey v New York City Tr. Auth.*, 270 AD2d 156 [1st Dept 2000]). Here, this Court determines that the deposition of the parties may lead to relevant evidence. Significantly, Mr. Kress states, in his Corrective Action Memorandum that plaintiff's termination, in part, was based upon defendant Bardell's feedback.


Upon review and the analysis of statutory authority, relevant case law, the papers submitted and the record, this Court determines that the defendants' motion is premature. The Honorable Laura Douglas issued Discovery Orders; and the parties engaged in an email exchange to schedule depositions as well as additional discovery. Notwithstanding, the defendants filed the instant motion.

Accordingly, the defendants' motion for summary judgment is **DENIED** as stated herein and either party, upon completion of discovery, may move for the same relief.

The movant is directed to serve a copy of this Order with Notice of Entry, upon the parties within thirty (30) days of entry of this Order and file proof of service with the Court.

This constitutes the Decision and Order of this Court.

Dated: February 22, 2022
Bronx, New York



Hon. Kim Adair Wilson, J.S.C.