Diolosa v Regency Intl. Bus. Corp.

2025 NY Slip Op 30233(U)

January 21, 2025

Supreme Court, New York County

Docket Number: Index No. 158730/2016

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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NEIL DIOLOSA,

Plaintiff,

- v -

REGENCY INTERNATIONAL BUSINESS CORPORATION, BROOKLYN COMMERCIAL REALTY CORP.

Defendants.

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INDEX NO. 158730/2016

MOTION DATE 06/04/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

In this employment discrimination action, defendants Regency International Business Corporation ("Regency") and Brooklyn Commercial Realty Corp. ("BCRC") move pursuant to CPLR § 3212 for summary judgment to dismiss the complaint. Plaintiff has two causes of action against defendants for violations of the New York City Human Rights Law ("NYCHRL"). Plaintiff alleges that he was discriminated against and subjected to workplace harassment because of his age, race/national origin, disability, and gender. Plaintiff also alleges that he was retaliated against for complaining about this alleged discrimination and was unlawfully terminated because of it.

BACKGROUND

Defendant, Regency is a New York based corporation, that imports and re-sells floral displays (NYSCEF Doc No 60 at ¶ 98 – 99). BCRC is a real estate company owned by Dick Merhige, the President and CEO of Regency (*id*. at ¶ 2, 102). Plaintiff was hired by Regency in 2002 as an Accountant/Bookkeeper (*id*. at ¶ 108). Plaintiff's job duties, among others included

processing bills and payroll, bookkeeping, preparing invoices, and maintaining personnel files and employee benefit packages (*id*. at ¶ 110). Plaintiff alleges that during his time at Regency, the Company's management team, including Dick Merhige, Vice President Richard Merhige, and Vice President Danny McDonald made countless discriminatory comments about older employees, about Italian Americans, and about a preference for hiring female employees (*id*. at ¶ 123 – 140).

In 2012, plaintiff had surgery on his knees which required him to attend physical therapy three days a week (*id*. at ¶ 141). While Regency's normal office hors were 9:00 AM to 5:00 PM, on days where plaintiff was required to attend physical therapy he would come in early and leave early to maintain an 8 hour schedule (NYSCEF Doc No 60 at ¶ 143). Plaintiff alleges that despite Danny McDonald's awareness that plaintiff was attending physical therapy, he continuously threatened his employment, and verbally abused him for attending these sessions (*id*. at ¶ 146 – 147). In June of 2014, plaintiff was terminated from his employment at Regency (*id*. at ¶ 163)

DISCUSSION

Summary Judgment Standard

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material

issues of fact which require a trial of the action." (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility." (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

NYCHRL Claim

Section 8–107(1)(a) of the NYCHRL makes it

> an unlawful discriminatory practice … [f]or an employer or an employee or agent thereof, because of the actual or perceived age, race … gender, disability … of any person… [t]o refuse to hire or employ or to bar or to discharge from employment such person or [t]o discriminate against such person in compensation or in terms, conditions or privileges of employment.

"A motion for summary judgment dismissing a City Human Rights Law claim can be granted only if the defendant demonstrates that it is entitled to summary judgment under both the *McDonnell Douglas* burden-shifting framework and the 'mixed-motive' framework" (*Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 514 [1st Dept 2016] [internal citations omitted]). "Under the *McDonnell Douglas* framework, a plaintiff asserting a claim of employment discrimination bears the initial burden of establishing a prima facie case" (*id.*) Plaintiff makes

that showing by establishing that "(1) [he] is a member of a protected class; (2) [he] was qualified to hold h[is] position; (3) [he] was terminated from employment or suffered an adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination" (*Hamburg v New York Univ. School of Medicine*, 155 AD3d 66, 74 [1st Dept 2017]).

"If the plaintiff makes such a showing, the burden shifts to the employer to show a legitimate, nondiscriminatory reason for the employment decision" (*Hudson*, 138 AD3d at 514). "If the employer succeeds in doing so, the burden then shifts back to the plaintiff to prove that the reason proffered by the employer was merely a pretext for discrimination" (*id.*).

"Under the 'mixed-motive' framework, the question on summary judgment is whether there exist triable issues of fact that discrimination was one of the motivating factors for the defendant's conduct" (*id.*). "Thus, under this analysis, the employer's production of evidence of a legitimate reason for the challenged action shifts to the plaintiff the lesser burden of raising an issue as to whether the [adverse employment] action was motivated at least in part by discrimination" (*id.*).

Here, plaintiff alleges that he was fired due to his age, disability status, gender, and race/national origin. "[T]he burden of establishing a prima facie case of discrimination is 'not onerous'" (*Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 37 [1st Dept 2011] [*quoting Texas Dept. of Community Affairs v. Burdine*, 450 US 248, 253 [1981]]). The initial showing is intended to be "*de minimis*" because "discrimination rarely announces itself, so that generally a discrimination plaintiff must ask the fact-finder to infer the defendant's intent from circumstantial evidence that can be difficult to obtain" *(id.*).

Notably, "[a]t the summary judgment stage, a court should not confuse the limited assessment of all the evidence in the case (an issue identification function, not an issue resolution function) with a retroactive critique of the adequacy of the initial prima facie showing" (*id*. at 38). "If a court were to tarry at all at the summary judgment stage on the question of whether a prima facie case has been made out, it would need to necessarily ask whether the initial facts described by the plaintiff, *if not otherwise explained,* give rise to the *McDonnell Douglas* inference of discrimination" (*id*. at 38-39).

Here, it is undisputed that plaintiff belongs to the protected classes he alleges, that he was qualified to hold the position and that he was terminated. As for the fourth *McDonnell Douglas* factor, plaintiff submits his own testimony regarding allegedly discriminatory comments he had heard over the years working at Regency, made by management.

Race / National Origin

As for evidence of racial/national origin discrimination for example, plaintiff testified:

> I had told Dick the owner, Dick Merhige, that he lived a few blocks from my cousin in Brooklyn. And he said to me, Yeah, I live with the rest of those paisans, the killers and the murderers, your whole bunch. And I looked at him and said, We are not killers and murderers. And he said, Oh, yes, you are.

(NYSCEF Doc No 65 at 34:16 – 35:2).

Plaintiff also submits testimony from himself and former Regency co-workers, Angela Orrino and Kathy Mascia, all of whom recount when Richard Merhige, told Orrino, also of Italian heritage to, "go into the kitchen and make her meatballs" (NYSCEF Doc No 67 at 19:25 – 20:8; NYSCEF Doc No 65 at 35:17 – 35:18; NYSCEF Doc No 76 at ¶ 9).

Age

As for age discrimination plaintiff testified that:

> "Because of my age, Danny McDonald would walk around the office, and he would make the comments, The old ladies need to be out of here; The old bags need to be out of here; The old guys need to be out of here. When I was at the copy machine, many times, he came right in back me and would stop and he would say, The old guys need to be out of here. *This was -- you know, it happened quite a bit.*

(*id*. at 26:6 – 26:15 [emphasis provided]).

Gender

As for gender discrimination, plaintiff testified that, he "heard Danny McDonald tell the higher-ups, the bosses, that, you know, we got to have women in this office. You got to get rid of the guys, because the women are easier to control and intimidate" (*id*. at 53:19 – 53:21).

The comments that plaintiff alleges he overheard regarding Italian Americans and older employees do rise to an inference of discrimination considering the repeated and pervasive nature of the comments (*see Mihalik v Credit Agricole Cheuvreux N. Am., Inc*., 715 F3d 102, 111 [2d Cir 2013] ["In evaluating both the plaintiff's claim and the defendant's affirmative defense, courts must consider the totality of the circumstances. [T]he overall context in which [the challenged conduct occurs] cannot be ignored"]).

However, the comment regarding a preference for female employees does not give rise to an inference of discrimination (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 125 [1st Dept 2012] ["Stray remarks such as these, even if made by a decision maker, do not, without more, constitute evidence of discrimination"]). Accordingly, the claim of discrimination under the NYCHRL predicated upon gender discrimination will be dismissed, as plaintiff has failed to meet his *prima facie* burden for this claim.

Disability

As for disability discrimination, plaintiff testified that Vice President, Danny McDonald, verbally abused him for attending physical therapy and told him , "I don't want you to go. You have to stay here," when plaintiff attempted to leave for his therapy sessions (NYSCEF Doc No 65 at 47:21 – 22). Given, the animus that plaintiff alleges he suffered because of his disability, and the requirement that he attend physical therapy, plaintiff has met his *prima facie* burden. These allegations also give rise to an inference of discrimination (*see Hamburg*, 155 AD3d at 74 [considering the *de minimis* requirement, it was proper for trial court to assume plaintiff has met burden of establishing *prima facie* case even though court ultimately dismissed the complaint]).

Plaintiff has satisfied his burden for a claim of disability, age, and race/national origin discrimination under the NYCHRL and the burden now shifts to defendants to show a legitimate, non-discriminatory reason for his firing.

Non-Discriminatory Reason

Defendants allege that plaintiff was fired solely because of poor performance. Defendants submit the testimony of Regency Vice President, Daniel McDonald who testified that he complained to plaintiff and Regency administration that invoices plaintiff was tasked with processing for payment to vendors, were not being paid on time (NYSCEF Doc No 45 at 52:8 – 53:24). McDonald further testified that when he confronted plaintiff regarding the late invoices, plaintiff indicated that he never received the paperwork required to process them (*id*. at 56:13 – 57:8). McDonald stated that upon further inquiry with other employees he discovered that the paperwork had been in plaintiff's possession for over a week, thus contradicting plaintiff's excuse (*id*.).

Defendants also submit the testimony of Regency CFO, and plaintiff's supervisor Jim Dolan who stated that at the time of plaintiff's termination, Regency was moving to a new

computer system that required its employees to have experience in Excel, and Oracle- based accounting systems (NYSCEF Doc No 45 at 53:22 – 55:5). They also submit plaintiff's testimony stating that he does not have familiarity with Excel (NYSCEF Doc No 44 at 144:12 – 14). Further, defendants' submit an affidavit by Jim Dolan where he states that he had received several complaints from Jim McDonald regarding plaintiff's work performance, and that plaintiff was struggling to perform his job duties or learn the new systems the company was implementing (NYSCEF Doc No 40 at ¶ 3, 4, 7). Here, defendants' have set forth a legitimate and nondiscriminatory reason for plaintiff's termination. Thus, the burden shifts back to plaintiff to establish that the non-discriminatory reasons were "merely a pretext for discrimination" (*Hudson*, 138 AD3d at 514).

Pretext for Discrimination

"Unlike the intended role for a *de minimis* prima facie showing, the task of challenging a defendant's proffered non-discriminatory reasons can frequently be onerous" (*Bennett*, 92 AD3d at 38). "A plaintiff may defeat summary judgment by offering some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete" (*Watson v Emblem Health Services*, 158 AD3d 179, 183 [1st Dept 2018]).

Plaintiff offers several pieces of evidence in support of his argument that the reasons defendants have given for his firing were a pretext for discrimination. First, while plaintiff argues that the fact that the company replaced him with a younger, non-disabled, woman of a different ethnic background, indicating that his firing was discriminatory, this alone does not raise an issue of fact regarding defendants' alleged discriminatory intent. While it is true that defendants "hired a younger[, non-disabled woman] around the time of plaintiff's termination, [she was given] a different [job] title," and had experience working with systems which plaintiff did not (*Sanders v*

Cooperatieve Rabobank U.A., 226 AD3d 606, 607 [1st Dept 2024]). "The elimination of plaintiff's role and hiring of other employees with different responsibilities and skills does not raise an inference of discrimination (*id*.).

However, plaintiff does proffer evidence that his firing for poor work performance was pretextual. Plaintiff's submission of his positive performance reviews are not probative because they are from 2004 – 2007 and he was fired in 2014 (*see E.E.O.C. v Bloomberg L.P.*, 967 F Supp 2d 816 [SDNY 2013] [past positive performance reviews do not create a triable issue of fact regarding plaintiff's current performance]). However, he also submits a recommendation letter written for him by Jim Dolan shortly after he was terminated wherein Dolan states he was "an exemplary employee and an excellent Accounts Payable Manager … [who] proved himself to be extremely conscientious and honest" (NYSCEF Doc No 87). Viewing the evidence in the light most favorably to plaintiff, and because summary judgment is appropriate in NYCHRL cases, "only if the record establishes as a matter of law that a reasonable jury could not find the employer liable under any theory" (*Mihalik*, 715 F3d at 113), defendant's motion will be denied as plaintiff has raised a triable issue of fact regarding the legitimacy of the reason given for his firing given by defendant employers.

Mixed Motive

Under the "mixed motive" analysis, "plaintiff may defeat the defendant's evidence of legitimate reasons for the challenged action by coming forward with evidence from which it could be found that "unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor, for [the] adverse employment decision" (*Hamburg*, 155 AD3d at 73). As outlined above, plaintiff has offered evidence that a jury could plausibly find that unlawful discrimination based on his age, race/national origin, and disability status was at least

one of the motivating factors for his firing. Accordingly, summary judgment must also be denied because a triable issue of fact exists under the mixed motive analysis as well.

Dismissal as against BCRC

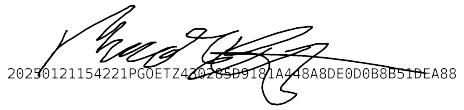
BCRC argues that the complaint must be dismissed as against it because BCRC was not plaintiff's employer. Plaintiff argues that while he was hired by Regency, BCRC is a properly named defendant as a "joint employer". He argues that determining the relationship between plaintiff and BCRC should be a fact issue to be determined at trial.

"In determining whether an ostensible non employer is actually a "joint employer" for purposes of employment discrimination claims under the State and City Human Rights Laws (HRLs), numerous Federal District Courts have applied the 'immediate control' test" (*Brankov v Hazzard*, 142 AD3d 445, 445-46 [1st Dept 2016]). "Under the 'immediate control' formulation, a joint employer relationship may be found to exist where there is sufficient evidence that the defendant had immediate control over the other company's employees, and particularly the defendant's control over the employee in setting the terms and conditions of the employee's work" (*id.* at 446). "Relevant factors in this exercise include commonality of hiring, firing, discipline, pay, insurance, records, and supervision." (*id.*).

Plaintiff submits testimony that his job duties included preparing invoices for BCRC, preparing payroll checks to BCRC employees, and assisting with BCRC benefit administration (NYSCEF Doc No 44 at 59:5 – 64:24). Considering that plaintiff performed duties for BCRC and that Dick Merhige owned BCRC and plaintiff was under his direct supervision and control, the complaint will not be dismissed as against BCRC as a joint employer relationship exists.

Accordingly, it is,

ORDERED that defendants' motion for summary judgment is granted only to the extent that plaintiff's discrimination claim based on gender is dismissed and the motion is otherwise denied.



1/21/2025
DATE

PAUL A. GOETZ, J.S.C.

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