

Jackson v OpenCommunications Omnimedia, LLC

2014 NY Slip Op 32696(U)

October 14, 2014

Supreme Court, New York County

Docket Number: 151596/14

Judge: Donna M. Mills

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

JOSEPH EARL JACKSON,

INDEX No. 151596/14

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 001, 002

OPENCOMMUNICATIONS OMNIMEDIA, LLC
et al.,

Defendants.

MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this motion to _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1-4

Answering Affidavits- Exhibits _____ 5

Replying Affidavits _____

CROSS-MOTION: YES NO

Motion sequence numbers 001 and 002 are consolidated for disposition herein.

In motion sequence number 001, defendants OpenCommunications Omnimedia LLC ("OpenCommunications"), John Andrew Morris and Kathryn Campisano (collectively "Defendants") move for leave to file an Amended Verified Answer, Affirmative Defenses, and Counterclaim. Plaintiff Joseph Earl Jackson, opposes the motion and cross-moves for leave to file an Amended Verified Complaint and to compel defendants to produce certain records.

In motion sequence 002, Defendants move for an Order to compel the plaintiff to produce documents and answer questions posed at his deposition. As per a so-ordered stipulation of the parties dated October 10, 2014, the parties have resolved most of the discovery issues between them. The remaining discovery issue that is unresolved, is Plaintiff's request regarding human resource investigation documents.

On August 5, 2014, Defendants took Plaintiff's deposition, during this deposition, Defendants claim that they learned for the first time that the Plaintiff was in possession of documents that may have been obtained without proper authorization. Defendants now seek leave to amend their Answer to include an additional Affirmative Defense predicated upon after-acquired evidence, and a Counterclaim against Plaintiff for violating the Computer Fraud and Abuse Act.

Generally, leave to amend a pleading pursuant to CPLR 3025(b) should be granted where there is no significant prejudice or surprise to the opposing party and where the proof submitted in support of the motion indicates that the cause of action or defense to be asserted in the amendment may have merit (see *Edenwald Contr. Co. v. City of New York*, 60 N.Y.2d 957, 959, 471 N.Y.S.2d 55, 459 N.E.2d 164 [1983]; *Ingrami v. Rovner*, 45 A.D.3d 806, 808, 847 N.Y.S.2d 132 [2007]). The court must examine the merits of the cause of action or defense to be asserted in the proposed amendment since leave to amend should not be granted where the cause of action or defense to be asserted is totally without merit or is palpably insufficient as a matter of

law (*id.* at 808, 847 N.Y.S.2d 132; *Hill v. 2016 Realty Assoc.*, 42 A.D.3d 432, 433, 839 N.Y.S.2d 801 [2007]).

In the case at bar, Defendants seek leave to amend their Answer in order to assert an additional affirmative defense and counterclaim. The proposed amendment is neither palpably insufficient nor patently devoid of merit, and there is no evidence that the amendment would prejudice or surprise the plaintiff (see *Medical Arts Off. Servs., Inc. v Erber*, 89 AD3d 698 [2011]).

Plaintiff also seeks to amend his Complaint, not to add causes of action, but to add facts to his Complaint. The underlying action was commenced to remedy sexual harassment, discrimination and retaliation under New York State Executive Law and under the New York City Administrative Code, that the Plaintiff allegedly sustained during his employment with the Defendants. Defendants' Complaint alleges that Defendants' employees engaged in verbal and physical conduct that rose to the level of sexual harassment. Plaintiff now wants to amend his Complaint to add additional allegations of sexual harassment.

While the courts are more hesitant to grant amendment motions, liberal though they are directed to be by CPLR 3025 (subd. [b]), when the facts on which they are based were known to the movant from the beginning and could have been pleaded without trouble earlier. Mere lateness is not a barrier to the amendment, as a rule, but lateness coupled with significant prejudice is" (Siegel, *New York Practice*, § 237, p. 289;

see also, CPLR 3026). "Prejudice sufficient to defeat an amendment must be traceable 'to the omission from the original pleading of whatever it is the amended pleading wants to add—some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add' " (*Wyso v. City of New York*, 91 A.D.2d 661, 662, 457 N.Y.S.2d 112, quoting Siegel, *New York Practice*, § 237, p. 289). Under these circumstances the Court finds no prejudice to Defendants by allowing the Plaintiff to amend the Complaint to assert new facts.

Plaintiff also requests that the Defendants produce all documents and notes related to an internal investigation conducted by Deborah Caldwell in connection with the Plaintiff's complaints of sexual harassment and discrimination. Following Plaintiff's report of workplace harassment, Ms. Caldwell, OpenCommunication's former Chief of Content, participated in an internal investigation of his complaint. Defendants claim that the Plaintiff is not entitled to the records on the presumption of privilege.

The general rule is that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]). However, materials prepared in anticipation of litigation or for trial may be obtained only upon a showing that the party seeking discovery has "substantial need" for the materials and is unable to obtain the information without "undue hardship" (CPLR 3101 [d] [2]). "The burden of proving that a statement is privileged as material prepared solely in

anticipation of litigation or trial is on the party opposing discovery " (*Sigelakis v Washington Group. LLC*, 46 AD3d 800, 800 [2007]). More particularly, "the party asserting the privilege that material sought through discovery was prepared exclusively in anticipation of litigation . . . bears the burden of demonstrating that the material it seeks to withhold is immune from discovery (see *Koump v Smith*, 25 NY2d 287, 294 [1969]) by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation" (*Ural v Encompass Ins. Co. of Am.*, 97 AD3d 562, 566 [2012]). An attorney's affirmation containing conclusory assertions that requested documents are conditionally immune from disclosure pursuant to CPLR 3101 (d) (2) as material prepared in anticipation of litigation, without more, is insufficient to sustain the movant's burden of demonstrating that the materials were prepared exclusively for litigation (see *Koump v Smith*, 25 NY2d 287 [1969]).

Accordingly it is

ORDERED that Defendants' motion for leave to amend their Answer herein is granted, and the Amended Answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the Plaintiff shall serve an Answer to the Amended Answer or otherwise respond thereto within 20 days from the date of said service; and it is further

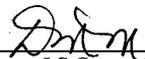
ORDERED that Plaintiff's cross-motion for leave to amend his Complaint herein is granted, and the Amended Complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the Defendants' shall serve an Answer to the Amended Complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the Plaintiff's cross-motion to compel the Defendants to produce the internal investigation of Deborah Caldwell is granted, and the Defendants are directed to turn this document over within 20 days upon service of a copy of this order with notice of entry thereof.

Dated:

10/14/14


J.S.C.

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION