

Lucarelli v New York Mercantile Exchange

2004 NY Slip Op 30281(U)

December 14, 2004

Supreme Court, New York County

Docket Number: 120246/03

Judge: Diane A. Lebedeff

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

PRESENT: DIANE A. LEBEDEFF

PART 8

0120246/2003

LUCARELLI, LYDIA
vs
PARZIALLE, GARY

INDEX NO. _____
MOTION DATE 8/31/04
MOTION SEQ. NO. _____
MOTION CAL. NO. 80

SEQ 2
AMEND

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

Notice of Motion/ ~~Order to Show Cause~~ Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

_____ } 1-4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
DEC 20 2004
NEW YORK
COUNTY CLERK'S OFFICE

Dated: DEC 14 2004

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY I.A.S. PART 8

-----X
LYDIA LUCARELLI,

Plaintiff,

-against-

Index No. 120246/03
Mot. Seq. No. 002

NEW YORK MERCANTILE EXCHANGE,
GARY PARZIALE, individually and in capacity as
agent of TFS Energy Futures, LLC and TFS Energy
Futures, LLC,

Defendants

-----X

FILED
DEC 20 2004
NEW YORK
COUNTY CLERK'S OFFICE

DIANE A. LEBEDEFF, J.:

New York Mercantile Exchange (“NYMEX”) moves for leave to amend its answer to assert defenses that plaintiff’s claims are preempted by federal law and that NYMEX, as a self-regulatory organization (“SRO”), is absolutely immune from lawsuits involving its self-regulatory functions. NYMEX separately moves for summary judgment under index number 119749/01, which action has been consolidated with another action under index number 120246/03; the grounds for summary judgment are those which are the subject of the motion to amend. The motions are consolidated herein for decision.

Relevant Facts

NYMEX is the self-regulatory organization (“SRO”) designated by the Commodity Futures Trading Commission to act as an authorized contract market or commodity exchange, and is required to “monitor and enforce compliance with [its] rules”

(Commodities Exchange Act, 7 U.S.C. § 7 [d], § 5 [d], herein “CEA”).

Plaintiff Lydia Lucarelli alleges that she was employed as a screen clerk for brokers who were members of NYMEX, and that her workplace was the floor of the NYMEX. She alleges that she was sexually harassed in the workplace by defendant Gary Parziale, a broker employed by defendant Tradition Financial Services (“TFS”), a member of NYMEX. Plaintiff grounds her claims against NYMEX on allegations that NYMEX is both a place of public accommodation pursuant to Executive Law § 292 (9), and a “joint employer” of herself and defendant Parziale.

This lawsuit, involving claims of sexual harassment in a workplace or place of public accommodation, has proceeded in fits and starts against the three defendants – the individual who allegedly harassed the plaintiff, his employer, and the defendant New York Mercantile Exchange (“NYMEX”) - since December of 2001. Plaintiff sought to amend her complaint and pursue discovery after a favorable decision in a somewhat similar case brought by a female broker against the American Stock Exchange (*see Bantum v. American Stock Exchange, LLC*, N.Y.L.J., p. 24, col. 3 [April 17, 2003, Sup. Ct. Queens Co., Dollard, J.]), which was recently reversed by the Appellate Division, Second Department (*Bantum v. American Stock Exchange, LLC*, 7 A.D.3d 551 [2d Dept. 2004]),

Plaintiff alleges that NYMEX regulates and controls day to day employment activities, and all activities and procedures on NYMEX premises (amended complaint, para. 8). She alleges that NYMEX has a Floor Committee, with jurisdiction over members, member firms and employees of members; that it has a duty to protect its workplace and to redress all incidents of sexual harassment; that it failed to “take prompt

and remedial action to stop the sexual harassment,” and that it did not promptly repaint a bathroom where sexually obscene graffiti concerning her was painted (amended complaint, paras. 9-10, 16-20).

With respect to plaintiff’s allegation that she is an employee of NYMEX, NYMEX shows that it has its own employees who are not members or employees of members, and that NYMEX employees may not be members while they are in the employ of NYMEX or for six months thereafter (NYMEX Rule 2.00 [C]). NYMEX also shows that it has promulgated an anti-discrimination policy, which provides “no Member, employee of a Member, nor any other person within the jurisdiction of the Exchange shall engage in any form of harassment against another person, such as a Member, employee of a Member, Exchange employee or CEC employee.” NYMEX’s rules are adopted pursuant to SEC approval. The policy defines harassment to include “verbal or non-verbal conduct, including abusive language or gestures, unwelcome physical contact, or the display of inappropriate reading material or objects, which results in hostile, offensive, or intimidating work environment; interferes with work performance; or otherwise affects employment at the Exchange” (exhibit D). Further, NYMEX has in place disciplinary procedures which resulted in imposition of a penalty on Parziale in connection with the harassing conduct forming the basis of this lawsuit.

Legal Discussion

Generally, absent a showing of any prejudice or unfair surprise that would result from an amendment, the court in its discretion may grant leave to amend and proceed to

consider the motion for summary judgment on its merits (CPLR 3025; *see Fahey v. County of Ontario*, 44 N.Y.2d 934, 935 [1978]). It is noted, however, that movant has not presented a copy of the proposed amended pleading.

In relation to the summary judgment request, “[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor” (*Friends of Animals v. Assoc. Fur Mfrs.*, 46 N.Y.2d 1065, 1067 [1979]). The party “opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

The court will proceed to consider the two legal arguments advanced.

A. Preemption Doctrine

Movant urges that plaintiff’s claims cannot proceed because of federal preemption. A finding of “preemption of State law by Federal statute or regulation is not favored” absent persuasive reasons to find preemption exists (*Rollin v. Wm. V. Frankel & Co., Inc.*, 290 A.D.2d 368 [1st Dept. 2002], citation omitted), “since there is an assumption that the historic police powers of the States [are] not to be superseded by * * * Federal Act unless that [is] the clear and manifest purpose of Congress” (*Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 [1992], internal citations and quotation marks omitted). Congressional intent to preempt state law may be stated expressly in the statute, or be found by

implication:

“The preemption question is ultimately one of congressional intent * * * [C]ongressional preemptive intent may be shown from express language in the Federal statute; it may also be established implicitly because the Federal legislation is so comprehensive in its scope that it is inferable that Congress wished fully to occupy the field of its subject matter (‘field preemption’), or because State law conflicts with the Federal law” (*Guice v. Charles Schwab & Co., Inc.*, 89 N.Y.2d 31, 39 [1996], cert. denied 520 U.S. 1118 [1997]).

When a preemption argument is raised, a court must engage in close scrutiny of the federal interest to be protected. For example, in *Guice v. Charles Schwab & Co., supra*, the court found implied preemption of plaintiffs’ common law claims concerning broker/dealers’ practice of receiving “order flow payments” (remuneration for routing customers’ orders for execution by wholesale dealers), because regulations adopted by the Securities and Exchange Commission, acting within its rule-making authority, permitted the practice challenged by plaintiffs. Thus, allowing plaintiffs’ state law claims to proceed could subject the broker/dealers to conflicting federal and state law and the preemption doctrine was found applicable (*see also American Agric. Movement, Inc. v. Board of Trade*, 977 F.2d 1147, 1154-57 [7th Cir. 1992], CEA preempts state law claims that “bear[] upon the actual operation of the commodity futures markets”).

In contrast, in *Delta Air Lines v. New York State Housing Authority*, 91 N.Y.2d 65 (1997), the Court of Appeals concluded that a broad federal regulatory statute, the Federal Airline Deregulation Act of 1978 (the “Airline Deregulation Act”), did not preempt application of New York State’s anti-discrimination laws to a regulated industry. The Court of Appeals concluded that the Airline Deregulation Act, which Congress intended to

promote competition and efficiency in the airline industry, does not preempt application of New York State Human Rights law to a regulated airline, because “whether an airline discriminates on the basis of age (or race or sex) has little or nothing to do with competition or efficiency” in the airline industry (*see also Rollin v. Wm. V. Frankel & Co., Inc.*, 290 A.D.2d 368 [1st Dept. 2002], “preemption by the Federal scheme for the regulation of securities is not applicable, since this is not a suit about a practice issue expressly regulated by the SEC”).

The situation presented here is closely analogous to that considered in *Delta Air Lines v. New York State Housing Authority*, *supra*. Here, the federal statute in issue is the CEA, which is primarily intended to prevent fraud and protect investors trading in commodities futures (*see Cary Oil Co., Inc. v. MG Refining & Marketing, Inc.*, 230 F. Supp.2d 439 [S.D.N.Y. 2002]). The state law claims are brought under the New York State and City Human Rights laws, which are intended to prevent discrimination on the basis of sex (or age or race or sexual preference) in employment and places of public accommodation. In this instance, enforcement of the state law will in no way impinge upon NYMEX’s ability to fulfill its regulatory functions with respect to the commodities futures market, or conflict with the federal regulatory scheme (*Delta Air Lines v. New York State Housing Authority*, *supra*).

In sum, since the issue of whether a self-regulatory organization condones sexual harassment “has little or nothing to do with” preventing fraud and protecting investors trading in commodities futures, there is no basis for concluding that the federal CEA preempts state law discrimination claims against the NYMEX.

Based on the foregoing, the motion for summary judgment is denied and leave to amend to add this affirmative defense is also denied.

Absolute Immunity Doctrine

The absolute immunity doctrine protects from suit a self-regulatory organization which is acting in a quasi-governmental capacity “within the scope of [its] regulatory and general oversight functions” (*D’Alessio v. New York Stock Exchange, Inc.*, 258 F.3d 93, 105 [2d Cir.], *cert. denied*, 534 U.S. 1066 [2001]), the NYSE is entitled to absolute immunity “when it is performing functions delegated to it under the SEC’s broad oversight authority,” such as “interpreting the securities laws for its members and in monitoring compliance with those laws”; *Sparta Surgical Corp. v. National Association of Securities Dealers, Inc.*, 159 F.3d 1209, 1214 [9th Cir. 1998], SROs are immune from suit “only when they are acting under the aegis of the Exchange Act’s delegated authority”; *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49, 57 [2d Cir. 1996], self-regulatory organization immune from suit by member concerning its conduct of disciplinary proceedings against that member). Similarly, absolute immunity protects an organization performing quasi-judicial functions, such as arbitration, from suits arising from its performance of those functions (*Barbara v. New York Stock Exchange, Inc.*, *supra*, citing *Austern v. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882 [2d Cir. 1990], *cert. denied* 498 U.S. 850 [1991]), CBOE, a private organization, is entitled to invoke arbitral immunity doctrine against “recriminatory lawsuits” by disappointed parties to arbitration sponsored by it; *Mandelbaum v. New York Mercantile Exchange*, 894 F.Supp. 676 [S.D.N.Y. 1995],

NYMEX absolutely immune from suit by target of disciplinary proceeding conducted by NYMEX).

On the other hand, a self-regulatory organization is a private corporation and is not absolutely immune from suits, such as discrimination lawsuits, brought against it in its capacity as a private employer¹ (*see Tavora v. New York Mercantile Exchange*, 101 F.3d 907 [2d Cir. 1996], *cert. denied*, 520 U.S. 1229 [1997], considering merits of Title VII claim brought by former employee of NYMEX, without discussing absolute immunity; *Shapira v. Charles Schwab & Co., Inc.*, 187 F. Supp.2d 188 [S.D.N.Y. 2002], holding absolute immunity doctrine does not require dismissal of claim that NASD tortiously interfered with plaintiff's prospective economic advantage by wrongfully disclosing sealed arrest record to a potential broker-employer, because the NASD did not show that its alleged actions were taken within its "regulatory mandate").

Further, there no reason to find a self-regulatory organization immune from suit based upon its status as a place of public accommodation, which must be made available to all persons without discrimination. As explained by the First Department, Appellate Division, in *D'Amico v. Commodities Exchange Inc.*, 235 A.D.2d 313 (1st Dept. 1997),

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Although NYMEX demonstrates that it was not plaintiff's employer in a traditional sense, the motion does not require resolution of the question of whether NYMEX may be considered an "employer" of either plaintiff or Paraziale for purposes of the Executive Law. In similar circumstances, this question was left open by the First Department in *D'Amico v. Commodities Exchange Inc.* in light of its finding that the COMEX was a place of public accommodation (*id.*, 235 A.D.2d at 314, *see D'Amico v. Commodities Exchange Inc.*, N.Y.L.J., p. 25, col. 5, April 30, 1995 [Sup. Ct. N.Y. Co., Goodman J.], finding issues of fact as to whether COMEX could be considered an employer of the plaintiff broker).

with respect to the Commodities Exchange Inc. ("COMEX"), another SRO:

"[I]t is clear that the trading floor of the COMEX is a place of public accommodation under Executive Law § 296 (2) (a). Not only does the COMEX engage in commodities trading by virtue of Federal law (see, 7 USC § 7), but an individual who is desirous of pursuing a career in that area has little choice but to use its trading floor. Thus, to accept defendants' position [that it is not a place of public accommodation] would, in effect, enable the COMEX to prevent, at will, any woman, or anyone else its members disapproved of, from trading in commodities simply by discriminating against and/or harassing that individual sufficiently to discourage her or him from remaining in the profession, and there would be no recourse under the Human Rights Law (Executive Law § 296) or its almost identical Federal counterpart (42 USC § 2000e-2 et seq.).

"Executive Law § 300 states that '[t]he provisions of this article shall be construed liberally for the accomplishment of the purposes thereof', a goal that would not be advanced by the sort of strict construction being advanced by defendants. As the Court of Appeals explained in *Matter of Cahill v. Rosa* (89 NY2d 14, 20), the purposes of the statute 'are to ensure that every person in this State has 'an equal opportunity to enjoy a full and productive life.'" (*id.* at 314.)

Thus, this argument has little appeal as broadly stated. To the extent plaintiff asserts that NYMEX, in its capacity as a private corporation, functioning as a place of public accommodation and/or a workplace for employees of members, had knowledge of and acquiesced in or condoned discriminatory harassment by its members on its floor, it may be held liable for such conduct, as set forth in *D'Amico v. Commodities Exchange Inc.*, *supra* (see also *Shapira v. Charles Schwab & Co., Inc.*, *supra*).

Nonetheless, one aspect of this issue is already raised as an ingredient in NYMEX's existing third affirmative defense, in that NYMEX did fine Parziale at some point (see summary judgment motion, reply affidavit, exhibit G, date illegible). NYMEX's papers shed no light on whether it acted promptly. To the extent that the thrust of plaintiff's claim

against NYMEX were that she is aggrieved by the results of a NYMEX disciplinary proceeding, her claim is barred by absolute immunity (*see Bantum v. American Stock Exchange, LLC, supra*, dismissing a sex discrimination claim brought by a female trader against AMEX, stating that to allow “plaintiff’s claims against AMEX arising out of its disciplinary functions would clearly ‘stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’”).

In any other regard, the record advanced by movant makes no factual showing that NYMEX had little knowledge of the alleged harassing behavior by the individual defendant, and did not acquiesce in or subsequently condone such conduct (*see Forrest v. Jewish Guild for the Blind*, 309 A.D.2d 546 [1st Dept. 2003], *aff’d*, 2004 WL 2381195, – N.E.2d – [Ct. App., Oct. 26, 2004], citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 [1993]). Further, NYMEX does not move upon the basis that, like any other private corporate defendant in an employment discrimination suit, it relies on its promulgation and enforcement of anti-discrimination rules as a defense (*see, e.g., Vitale v. Rosina Food Products Inc.*, 283 A.D.2d 141, 143 [4th Dept. 2001], “defendant [employer] may disprove condonation by a showing that it reasonably investigated complaints of discriminatory conduct and took corrective action”; *New York City Health and Hospitals Corp. v. New York State Div. of Human Rights*, 236 A.D.2d 310 [1st Dept. 1997]; *see also Faragher v. City of Boca Raton*, 524 U.S. 775 [1998], recognizing defense to claim of harassment by supervisor based on plaintiff’s failure to utilize reasonable anti-harassment procedures instituted by employer).

Accordingly, the branch of NYMEX's motion seeking dismissal on the grounds of absolute immunity is denied to the extent set forth below.

Conclusion

For the reasons set forth above, the motions are denied except to the extent that it is determined that any claim by plaintiff against NYMEX of being aggrieved by the results of a NYMEX disciplinary proceeding is barred by absolute immunity (CPLR 3212 [e]).

Given the lack of factual development in the motion papers, such denial of summary judgment is with leave to renew following completion of discovery.

This decision constitutes the order of the court

Dated: December 14, 2004



J.S.C.

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