Kaspi v Fairway Operating Corp.
2007 NY Slip Op 32273(U)
July 16, 2007
Supreme Court, New York County
Docket Number: 0113786/2003
Judge: Marylin G. Diamond
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SCANNED ON 7/23/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48
Justice

CARMIT KASPI,

Plaintiff,

- v -

FAIRWAY OPERATING CORP. et al.,

Defendants.

INDEX NO. 113786/03

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that: The plaintiff, Carmit Kaspi, was hired by the defendants, who own and operate three Fairway food markets in the New York metropolitan area, to manage Fairway's Graphics Department. She was employed by the defendants from January 14, 2002 to December 2, 2002, at which time she was terminated. The plaintiff is a Jewish woman and an Israeli citizen. Alleging that she was subjected to a hostile work environment based on her religion and nationality which affected the conditions of her employment, she brought this action under section 8-107(1)(a) of the New York City Civil Rights Law (N.Y.C. Admin. Code § 8-107[1][a]). She also asserted a retaliation claim under section 8-107(7) of the NYC Civil Rights Law, alleging that the defendants retaliated against her by terminating her employment after she spoke to one of Fairway's owners about the hostile work environment to which she had been subjected.

At trial, the plaintiff claimed that during her employment at Fairway, she was subjected to a barrage of offensive words and harassing conduct because of the fact that she is an Israeli Jew. She testified that she had repeatedly told John Rossi, Fairway's store manager and her supervisor, about the slanderous statements made to her and about the conduct directed against her but that Mr. Rossi not only refused to take any corrective action, but was himself hostile about her complaints. She also claimed that she complained to Fairway's owners and that her complaints were ignored. Rossi and one of Fairway's owners, David Sneddon, disputed these claims. They testified that although plaintiff regularly complained about the conduct of other employees towards her, she did not complain that she had been subjected to anti-Israeli or anti-Jewish remarks. Finally, plaintiff claimed that she was fired in December, 2002 because she had complained two months earlier to Sneddon about the harassment she had been subjected to on the basis of her nationality and religion. Sneddon denied this charge, as did the person who was her supervisor in October, 2002, Armando Gonzalez, who testified that he had serious issues with plaintiff's job performance, including complaints from various departments that her signs contained numerous misspellings.

Plaintiff sought compensatory and punitive damages, as well as back pay, totaling at least $21 million. In its verdict, the jury rejected plaintiff's hostile work environment claim. In doing so, it clearly discredited the plaintiff's testimony that she had repeatedly complained to Ross and Sneddon about being subjected to conduct and remarks based on her religion and nationality while crediting the contrary testimony of the defendants' witnesses. Although the plaintiff's retaliation claim was based on her assertion that she was terminated because she had complained to Sneddon about such anti-Israeli and anti-Jewish conduct and remarks, the jury nevertheless found in her favor on her retaliation claim, awarding her back pay in the amount of $20,700. The jury, however, minimized this finding by refusing to award her any compensatory or punitive damages on this claim.

The plaintiff has now moved for an award of attorney's fees in the amount of $679,060, pursuant to section 8-502(f) of the NYC Civil Rights Law, plus prejudgment interest in the amount of

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$7,435. The defendants have cross-moved for costs, pursuant to CPLR 3221, in the amount of $73,114.50, on the ground that the money judgment awarded to the plaintiff was less than their pre-trial offer of settlement.

Discussion

1. Attorney's Fees - To recover attorney's fees under section 8-502(f) of the NYC Civil Rights Law, a plaintiff must be a prevailing party. In construing this term under 42 USC § 1988, the Supreme Court has held that it may generously be formulated for attorney's fees purposes as success "'on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Hensley v. Eckerhart*, 461 US 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F2d 275, 278-279 [1st Cir 1978]). However, in *Hensley*, the Court emphasized that the extent of a plaintiff's success is a crucial factor in determining the proper amount of the attorney's fee award and that where the plaintiff achieves only limited success, the court should award only that amount of fees which is reasonable in relation to the results obtained. *Id.* at 435-436. In *Farrar v. Hobby*, 506 US 103, 115-116 (1992), the Court expanded on this reasoning by stating that although a plaintiff may have formally prevailed on a claim by obtaining a nominal or technical victory, a trial court may nevertheless, in its exercise of discretion, properly determine, under certain circumstances, that low fees or no fees should be awarded. Specifically, the Court held that where recovery of private monetary damages is the sole purpose of civil rights litigation, a trial court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought. *Id.* at 114-115. In doing so, the trial court may award no fees, or may award a low fee without applying the lodestar method of multiplying the number of hours reasonably expended by a reasonable hourly rate. *Id.*

Here, despite the jury's award of $20,700 on plaintiff's retaliation claim, the parties, as well the court, clearly recognized at the time the verdict was handed down that she suffered a resounding defeat in this litigation. The plaintiff's sole goal in bringing this lawsuit was to obtain a major monetary award of damages. As already noted, she sought to obtain as much as $21 million in damages. As a consequence, she not only rejected a pre-trial offer of the defendants of $100,000, but also turned down an offer in excess of one-half million dollars made during trial. In addition, the plaintiff's primary claim throughout this litigation was that she had been harassed on the basis of her nationality and religion by both co-employees and her supervisor and, despite her complaints to the management and the owners, nothing was done. In rejecting this claim, the jury clearly credited the testimony of the defendants' witnesses that although the plaintiff had complained about the conduct of her co-employees, she had not informed them that this conduct was based on her nationality and religion.

In her concurring opinion in *Farrar*, Justice O'Connor stated that in addition to assessing the extent of the relief obtained, a court should also consider the significance of the legal issue on which the plaintiff prevailed and the public purpose served. *See Farrar v. Hobby*, 506 US at 122 (O'Connor, J., concurring). Here, the jury's favorable verdict on plaintiff's retaliation claim has little significance since it had clearly rejected her assertion that she had complained to management and ownership that she was being harassed on the basis of her religion and nationality. For the same reason, no public purpose was served by the $20,700 award for back pay. In addition, the court notes that although it had earlier denied the defendants' motion for summary judgment dismissing the complaint, it nevertheless considered the plaintiff's claims to be tenuous.

Under the circumstances, the plaintiff's request for an attorney's fee award of $679,060 is a wildly excessive attempt to snatch victory from the jaws of defeat. Nevertheless, "having considered the amount and nature of damages awarded," *Farrar*, 506 US at 115, the court has concluded that the plaintiff is entitled to an award of some attorney's fees. Indeed, although quite limited in the context of this action, a jury award of $20,700 is by no means a nominal amount and the defendants have not cited any cases, and the court has found none, where no fees were awarded on a verdict for such an

amount.

As suggested in *Farrar*, the court is persuaded that it would be inappropriate to even use the lodestar method to calculate the attorney's fees which should be awarded herein. The court has concluded that it is more appropriate herein to calculate attorney's fees on a one-third contingency basis. Indeed, one district court judge has observed that such a contingency-fee contract is usual in title VII cases and that he seldom awards a fee that is greater than one-third of the amount recovered. *See Hughes v. Furniture on Consignment, Inc.*, 2005 WL 3132345 * 3 (D. Neb 2005). The court therefore awards plaintiff attorney's fees of $6,900, an amount equal to one-third of her $20,700 jury award.

In doing so, the court determines that there is no merit to the defendants' argument that the application of CPLR 3221 precludes any attorney's fee award in this case. CPLR 3221 provides that where, no later than ten days before trial, a defendant serves upon the plaintiff a written offer to allow judgment to be taken against him for a specified sum and where the offer is not accepted and the plaintiff thereafter fails to obtain a more favorable judgment, the plaintiff shall not recover costs from the time of the offer but shall pay costs from that time. Here, on January 6, 2006, the defendants made a formal offer of settlement to the plaintiff in the amount of $100,000 and the offer was rejected. Since the jury award was less than the offer, the defendants are clearly entitled to the costs which they incurred after the offer was made and the plaintiff is not entitled to any costs from that time.

The defendants argue that the definition of "costs" under CPLR 3221 should include attorney's fees since the federal courts have construed a similar provision under the federal rules (Fed R. Civ.P 68) as barring civil rights plaintiffs who otherwise prevailed from recovering attorney's fees where they rejected an offer which was more favorable than what they thereafter recovered at trial. *See Marek v. Chesny*, 473 US 1,4 (1985); *Reiter v. MTA New York City Transit Auth.*, 457 F2d 224 (2nd Cir 2006). There are two problems with this argument. First, "costs" under CPLR 3221 has never been construed as applying to anything other than the statutory costs and disbursements set forth under articles 82 and 83 of the CPLR. There is nothing in the CPLR which even suggests that costs may be defined as including attorney's fees. Second, as the New York Court of Appeals has noted, the federal civil rights laws which the federal courts have construed expressly provide that attorney's fees are "part" of the costs which may be awarded to a prevailing party. *See McGrath v. Toys "R" Us, Inc.*, 3 NY2d 421, 428-429 (2004). In contrast, section 8-502(f) of the City Human Rights Law distinguishes between attorney's fees and costs, expressly providing that a prevailing party is entitled to "costs and reasonable attorney's fees" (emphasis added). Although the Court of Appeals, in *McGrath*, suggested that the attorney's fees provision of the City Human Rights Law is "indistinguishable" from provisions in comparable federal civil rights statutes, the fact is that, for the purposes of defining "costs" under CPLR 3221, the federal and city laws are materially different.

2. Costs - As previously discussed, the defendants are clearly entitled, under CPLR 3221, to the costs which they incurred after their offer of settlement was made. Towards that end, the defendants have submitted a bill of costs for the court's approval and have now cross-moved for an order approving these costs. The costs come to $73,114.50. Given the fact that the CPLR 3221 is considered a "weak" provision which offers only "peanuts" to a defendant, *see Siegel*, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B (2005 ed), C3221:3, p. 827, this request is astonishing. Much of it is also without statutory support.

As the court has already indicated, the post-offer costs which CPLR 3221 requires the plaintiff to pay are the statutory costs set forth under CPLR article 82 and the necessary disbursements, as set forth under CPLR article 83, which a party to whom costs are awarded is entitled to tax. As such, the defendants are entitled to $600 in statutory costs under CPLR 8201(2) and (3) and 8202. They are not entitled to costs under CPLR 8201(1) for proceedings before the note of issue was filed since the settlement offer was made after the note of issue was filed on March 22, 2005. As to disbursements,

the court agrees that the defendants are entitled to the following amounts: (1) legal fees for witnesses in the amount of $64.50; (2) commissioners taking depositions in the amount of $881.77; (3) printing costs during trial in the amount of $2,725.71; (4) transcripts of EBT testimony in the amount of $150; (4) postage and other related expenses in the amount of $541.76; and (5) charges for entering dockets in the amount of $90. The defendants' request for $3,077.73 for what they characterize as "official searches" is denied. In making this request, the defendants have inexcusably and frivolously sought to recover the expenses they incurred for legal research through Westlaw and Lexis. Their request for $9,173.90 for trial economic expert fees is also denied since there is no statutory basis for granting such a disbursement. The court notes that their reliance on CPLR 8303(2) is misplaced since this was not, as that provision requires, a difficult or extraordinary case and that, in any event, recovery under this provision is limited to a maximum of $3,000. The defendants' request under CPLR article 84 for five items totaling $55,609.13 is also denied since article 84 does not even authorize, much less require, that such expenses be recovered. In sum, the court finds that the defendants are entitled under CPLR 3221 to costs and disbursements totaling $5,053.74.

Finally, although the plaintiff is precluded under CPLR 3221 from being awarded costs from the time of the defendants' January 6, 2006 settlement offer, she is nevertheless, as the prevailing party, entitled to the costs and disbursements which preceded that date. In connection with the filing of the final judgment herein, she may submit a bill of costs to the Clerk's Office.

3. Prejudgment Interest - It is well settled that a plaintiff in an employment discretion case who has been awarded back pay is entitled to prejudgment interest. *See Aurecchione v. New York State Div of Human Rights*, 98 NY2d 21, 26 (2002). *See also Gierlinger v. Gleason*, 160 F3d 858, 873 (2nd Cir 1998). Indeed, the defendants do not dispute this point. CPLR 5001(b) provides that interest "shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred." Since the plaintiff here was terminated on December 2, 2002, she is entitled, as she suggests in her motion papers, to prejudgment interest from that date to the entry of judgment herein, with her wages, as awarded by the jury, equally apportioned over this time period. The defendants have not disputed this point, as well.

The dispute between the parties concerns the issue of whether the prejudgment interest should, as the defendants contend, be calculated as only interest on interest or, as advocated by the plaintiff, as interest compounded annually on both the principal and the previously-accumulated interest. *See Spodek v. Park Property Development Assocs.*, 96 NY2d 577, 580 (2001). In employment discrimination cases where back pay has been awarded, the federal courts have generally held that interest should be compounded annually in such a way as to fully compensate the plaintiff for the loss of the use of her money. *See, e.g., Jowers v. DME Interactive Holdings, Inc.*, 2006 WL 1408671 * 12 (SDNY); *Vitullo v. Borough of Yeadon*, 2006 WL 964486 * 3 (ED Pa). In this respect, the New York Court of Appeals has held that prejudgment interest compounded annually on both the principal and the previously-accumulated interest is the most effective method of making an aggrieved party whole for his or her loss of the use of money. *See Spodek v. Park Property Development Assocs.*, 96 NY2d at 581. This court therefore finds that the plaintiff is entitled to prejudgment interest, compounded annually over the period between December 2, 2002 and the entry of judgment herein, on both the principal and the previously-accumulated interest.

The parties shall settle judgment on notice.

Dated: 7/16/07

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [X] FINAL DISPOSITION [] NON-FINAL DISPOSITION