

Espinosa v The Delgado Travel Agency, Inc.

2007 NY Slip Op 32937(U)

September 11, 2007

Supreme Court, New York County

Docket Number: 0110983/2007

Judge: Milton A. Tingling

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

PRESENT: Hon. Milton A. Tingling
Justice

PART 44

Espinosa, Nancy Patricia Et Al.

INDEX NO. 110983/07

MOTION DATE _____

- v -

The Delgado Travel Agency, Inc

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

Plaintiffs Nancy Patricia Espinosa and Monica Montero move for a Preliminary Injunction requiring Defendant The Delgado Travel Agency, Inc. to circulate to its employees a sexual harassment policy that contains the provisions of paragraph seven of the settlement agreement between the parties. Defendant cross-moves to dismiss Plaintiffs' Complaint.

On August 3, 2005 Plaintiffs filed an action against Defendant, their former employer, in the United States District Court for the Southern District of New York, asserting various causes of action for sexual harassment and for unpaid wages. In April 2007, Plaintiffs entered into a settlement agreement with Defendant. The settlement agreement mandated the adoption of policies by The Delgado Travel Agency to protect its employees from sexual harassment and pregnancy discrimination allegedly committed by Delgado Travel against its female employees.

Paragraph seven of the settlement agreement provides: Delgado Travel agrees that

(a) It shall prepare a document for distribution to all employees that contains policies and procedures

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

* 2.1

that (i) prohibit all discrimination and harassment prohibited by federal, state, or local law, including without limitation gender discrimination, pregnancy discrimination and sexual harassment; (ii) prohibit retaliation against any person who makes or participates in the investigation of a complaint under the policies referenced in clause (i) above; and (iii) establish procedures to address, investigate, and appropriately respond to complaints of violations of the policies referenced in clauses (i) and (ii) above. In addition, the document shall state that a party who is aggrieved by a violation of such policies may seek a mandatory injunction from any court having jurisdiction to enforce adherence to the policies and procedures set forth in the document or to require that the document be amended.

(b) *The policies and procedures document referenced in subparagraph (a) above shall be circulated to all employees on or before July 1, 2007* (emphasis added). Prior to such circulation, such policies shall be provided to Plaintiffs' counsel, Peter G. Eikenberry, Esq., who shall be entitled to comment on such policies, provided that Delgado Travel shall have no obligation to accept any such comments.

(c) Delgado Travel may, in its discretion, amend the policies and procedures referenced above. In connection with any amendment effective on or before June 30, 2010, Delgado Travel shall give not less than 30 days prior notice of any such amendment to Peter G. Eikenberry, Esq., who shall be entitled to comment on such policies, provided that Delgado Travel shall have no obligation to accept any such comments.

(d) It shall ensure that managers, supervisors, and individuals responsible for personnel functions receive appropriate training concerning the policies and procedures governing discrimination and harassment as set forth in the document to be distributed.

(e) Should Delgado Travel fail to comply with the provisions of subparagraphs (a) through (d) above, it shall make a contribution of not less than \$25,000 to either the National Organization for Women or the Puerto Rican Legal Defense Fund. In addition, in the event that Delgado Travel is adjudicated to have failed during the period from July 1, 2007 through June 30, 2012 to have adequate policies and procedures of the kind referenced in subparagraph (a) above or to have adequately enforced such policies and procedures, it shall make an additional contribution of not less than \$25,000 to either the National Organization for Women or the Puerto Rican Legal Defense Fund.

Plaintiff contends that despite Plaintiffs' counsel's request, the terms of the settlement

agreement intended to protect the employees have not been fully circulated to Delgado Travel employees.

On June 12, 2006, counsel for Defendant submitted a draft of its Equal Opportunity and Workplace Harassment Policy to Peter G. Eikenberry, counsel for Plaintiffs. The draft harassment policy failed to include any mention of the fact that any employee who is aggrieved by a violation of Defendant's policies may seek a Mandatory Injunction from any court having jurisdiction to enforce adherence to the policies, as set forth in subdivision 7(a) of the settlement agreement. The proposed draft also failed to include the provisions contained within subdivisions 7(c) through 7(e) of the settlement agreement, including the requirement that Defendant properly train its managers and supervisors regarding its policies, and the requirement that Defendant pay \$25,000 to the National Organization for Women or the Puerto Rican Legal Defense Fund should Defendant fail to comply with other provisions of paragraph 7.

On June 15, 2007, Mr. Eikenberry contacted counsel for Defendant and requested that the draft harassment policy reflect subdivisions 7(a) and 7(c) through 7(e) of the settlement agreement. Defendant agreed to add a provision reflecting subdivision 7(a), stating that employees aggrieved by a breach of the policy may seek an Injunction or modification of the policy, but has refused to make the requested additions reflecting subdivisions 7(c) through 7(e).

It is well-established that a Preliminary Injunction will not be granted unless the movant demonstrates a likelihood of success on the merits (*Global Merchants, Inc. v. Lombard & Co.*, 650 N.Y.S.2d 724 (1st Dept. 1996); *Doe v. Axelrod*, 527 N.Y.S.2d 385 (1st Dept. 1988)). This Court finds that Plaintiff has failed to demonstrate a likelihood of success on the merits in this action. Upon reading the settlement agreement, it is clear that subdivisions 7(c) through 7(e) were not intended for distribution to all employees. Subdivision 7(b) of the agreement clearly states that the policies and procedures document referenced in subparagraph (a) shall be circulated to all employees. However, there is no provision in the settlement agreement that subdivisions 7(c) through 7(e) must also be distributed to all employees.

Accordingly, Plaintiffs' Motion for a Preliminary Injunction requiring Defendant to circulate to its employees a sexual harassment policy that contains the provisions of paragraph seven of the settlement agreement between the parties is denied. Defendant's Motion to dismiss this case is granted without prejudice to Plaintiff to renew this action should Defendant fail to comply with the

terms of the settlement agreement as they appear in the agreement. This constitutes the Decision and Order of the Court. Settle Order on notice.

Dated 1 Sept. 11, 2007

MA
JSC

HON. MILTON A. TINGLITZ
J.S.C.