

Roth v State Univ. of N.Y.

2007 NY Slip Op 33894(U)

November 23, 2007

Supreme Court, New York County

Docket Number: 0116729/2006

Judge: Leland G. DeGrasse

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

HON. LELAND DEGRASSE

PRESENT: _____

PART 25

Justice

Index Number : 116729/2006

ROTH, JEFFREY

vs

STATE UNIVERSITY OF NEW YORK

Sequence Number : 001

DISMISS LACK OF PROSECUTION

INDEX NO. _____

MOTION DATE SEP 21 2007

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.

FILED

NOV 30 2007

NEW YORK
COUNTY CLERK'S OFFICE

NOV 23 2007

YS

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

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

-----X
JEFFREY ROTH, JEROME SHERMAN and
HERMINDER BOPARAI,

Plaintiffs,

-against-

Index No. 116729/06

STATE UNIVERSITY OF NEW YORK, SUNY
STATE COLLEGE OF OPTOMETRY, ALDEN N.
HAFFNER, individually and in his official capacity,
STEVEN H. SCHWARTZ, individually and in his
official capacity, MITCHELL DUL, individually
and RICHARD WEBER, individually,

Defendants.

-----X

FILED
NOV 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

DeGrasse, J.:

Motion sequences 01 and 02 are consolidated. Defendants the State University of New York, SUNY State College of Optometry (collectively "SUNY"), Mitchell Dull and Richard Weber move for an order dismissing the complaint pursuant to CPLR 3211 (a)(8) or, alternatively, dismissing the 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 14th, 17th, 18th, 19th, 20th and 22nd causes of action, the claims for punitive damages asserted against SUNY and the claims against defendant Steven H. Schwartz as set forth in the 15th and 16th causes of action pursuant to CPLR 3211 (a)(2), (5) and (7). Defendant Alden N. Haffner moves for an order dismissing the complaint pursuant to CPLR 3211 (a)(8) or, alternatively, dismissing the 10th, 12th, 15th and 16th causes of action, the 1st, 2nd, 7th and 13th causes of action as to plaintiffs Jerome Sherman and Herminder Boparai, the 7th cause of action against Haffner in his official capacity and the claims for punitive damages pursuant to CPLR 3211 (a)(5) and (7).

Plaintiffs were employees of or students at SUNY State College of Optometry (SUNY Optometry) at the times relevant to their causes of action. It is alleged in the complaint that

Haffner, while President of SUNY Optometry, sexually harassed and assaulted plaintiffs and then retaliated against them after they rejected his advances. It is further alleged that SUNY and Schwartz condoned Haffner's conduct.

On November 8, 2006, plaintiffs commenced this action by filing with the court a summons with notice without a complaint pursuant to CPLR 305 (b). Defendants were served with copies of same. The statute requires that such a summons contain or have attached thereto "a notice stating the nature of the action and the relief sought, and, except in an action for medical malpractice, the sum of money for which judgment may be taken in case of default." The summons describes the nature of the action as follows:

"The nature of this action sounds in violations of federal, New York State, and New York City human rights laws, including but not limited to, the New York State Executive Law, § 296, *et seq.*; New York City Administrative Code § 8-107, *et seq.*, 42 U.S.C. 1983, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; Title II of the Americans with Disabilities Act, 42 U.S.C. 12132; Article I, Section II of the New York State Constitution; and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*; and various tort claims."

The relief sought is described as "Injunction, Compensatory Damages, including pain and suffering, Punitive Damages, Front and Back Pay, Interest, Attorneys' Fees, and all other remedies provided by statute or common law." On November 10, 2006, plaintiff served defendants with copies of a purported amended summons with notice without leave of the court. The amended summons adds the words sexual harassment, discrimination and hostile work environment to the description of the action. Movants contend that the court lacks personal jurisdiction because the initial summons is inadequate and the amended summons ineffective.

Plaintiffs contend that the November 8, 2006 summons satisfies the standard set forth under CPLR 305 (b). "When a summons is served without a complaint pursuant to CPLR 305 (b), it is imperative that 'at least basic information concerning the nature of plaintiff's claim and the relief sought' be provided" (*Scaringi v Broome Realty Corp.*, 191 AD2d 223 [1993]). The *Scaringi*

Court found the word “Premises” inadequate to describe the nature of a claim for purposes of the statute noting that it “could well encompass any number of causes of action” (*id.*). As set forth above, the November 8, 2006 summons merely recites six statutes and an article of the New York State Constitution. Executive Law § 296, the first statute plaintiffs invoke, prohibits discrimination in employment because of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics or marital status. Administrative Code of the City of New York § 8-107 prohibits discrimination based upon a person’s actual or perceived race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status. The Civil Rights Act (42 USC § 1983) provides for civil actions for violations of privileges and immunities secured by the Constitution and laws of the United States. The Rehabilitation Act (29 USC § 794) prohibits discrimination directed at persons with disabilities with respect to programs receiving federal financial assistance. Title IX of the Education Amendments of 1972 (20 USC § 1681) prohibits such discrimination on the basis of sex. The Americans with Disabilities Act (42 USC 12132) prohibits discrimination against qualified persons with disabilities by public entities. NY Constitution, article I, § 2 relates to the waiver of trial by jury.

It is clear that the November 8, 2006 summons does not even contain basic information concerning the nature of plaintiffs’ claims and could easily encompass any number of potential causes of action. “If a summons without a complaint contains an inadequate notice of the nature of the action and the relief demanded, the inadequate notice is grounds [sic] to dismiss the action” (*Micro-Spy v Small*, 9 AD3d 122, 125-126 [2004]). “A summons dismissed for failure to comply with the notice requirements of CPLR 305 (b) is ‘jurisdictional defective’ and cannot be amended (*id.* at 126). Accordingly, the motions are granted and the complaint dismissed

pursuant to CPLR 3211 (a)(8). The Clerk shall enter judgment accordingly.



J. S. C.

Dated: November 23, 2007

HON. LELAND DEGRASSE

FILED
NOV 30 2007
NEW YORK
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