

**Robinson v Corporate Consulting Servs., Ltd.**

2007 NY Slip Op 34084(U)

December 4, 2007

Supreme Court, New York County

Docket Number: 0105271/2005

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice*

PART 7

Index Number : 105271/2005  
**ROBINSON, CHRISTOPHER LLOYD**  
vs.  
**CORPORATE CONSULTING SERVICES**  
SEQUENCE NUMBER : 001  
COMPEL

INDEX NO. 105271/05  
MOTION DATE 9/20/07  
MOTION SEQ. NO. 002  
MOTION CAL. NO. 15

The following papers, numbered 1 to 6 were read on this motion and cross motion to compel

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits A-G	<u>1-2</u>
Answering Affidavits — Exhibits A-O	<u>3-5</u>
Replying Affidavits — Exhibits A-E	<u>6</u>

Cross-Motion:  Yes  No


Upon the foregoing papers, It is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

J.S.C.

Dated: 12/4/07  
New York, New York

**FILED**  
DEC 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE  
**MICHAEL D. STALLMAN**  
J.S.C.

  
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7

-----X  
CHRISTOPHER LLOYD ROBINSON,

Plaintiff,

Index No. 105271/05

- against -

CORPORATE CONSULTING SERVICES, LTD and GRANT  
DOUGHERTY,

Decision and Order

Defendants.  
-----X

HON. MICHAEL D. STALLMAN, J.:

**FILED**  
DEC 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

In this action, plaintiff alleges employment discrimination, retaliation, and constructive discharge based on his race, color, national origin, and disability. Plaintiff moves to compel defendants to comply with certain items of plaintiff's demand for production of documents.

**BACKGROUND**

Plaintiff was an employee of defendant Corporate Consulting Services Ltd (CCS) from 1996 through 2005. CCS is an insurance brokerage firm that sells employee benefit plans. According to CCS, it is divided into sales and account management. Plaintiff, an African American man of Jamaican ancestry, was a vice-president in sales. In November 2003, plaintiff suffered a heart attack. Plaintiff allegedly resigned from CCS on October 31, 2005, moved to Florida, and bought a landscaping business.

Plaintiff commenced this action on April 15, 2005. Plaintiff alleges that he was paid on a different pay scale than similarly situated employees; his commissions were improperly withheld; his right to shares of company stock were subject to requirements not imposed upon Caucasian employees; Caucasian counterparts were allowed to purchase more stock than plaintiff; office

procedures were selectively enforced against plaintiff, and not other Caucasian employees; unlike other Caucasian employees, he was required to contribute to the expense of a life insurance policy for CCS's president; and CCS reimbursed cell phone charges of only Caucasian brokers. See id., Ex D [Amended Verified Complaint ¶ 15]. CCS allegedly allowed only Caucasian employees to work from home one day a week. Id. ¶ 16.

Following plaintiff's heart attack, he claims that he was refused company benefits and a reasonable accommodation, unlike Caucasian members of the CCS sales force. He claims that CCS harassed him. Dougherty allegedly told plaintiff that his performance was unsatisfactory, and defendants allegedly cut his compensation by about 30%. Id. ¶¶ 22-23. Plaintiff claims that he complained about being treated differently, which allegedly resulted in a tracking system that required only plaintiff to inform the company reception of his appointments. Id. ¶ 24. Plaintiff contends that he was not featured on the CCS website when it was launched, and ultimately, defendants ceased all communications with plaintiff. Plaintiff maintains that he was forced to resign from the company.

Plaintiff was deposed on October 19, 2006. On April 6, 2007, plaintiff served a demand for production of documents. See Harris Affirm., Ex F. Defendants responded to plaintiff's demand via email on May 31, 2007, with accompanying documents sent several days later. See id., Ex G.

Plaintiff moves to compel defendants to comply with certain items of his demand. Defendants cross-move to compel plaintiff to appear for a further deposition.

## DISCUSSION

As a threshold matter, the Court rejects plaintiff's argument that defendants' opposition papers should be disregarded because the notice of motion was purportedly not served with any

supporting documentation. Assuming this occurred, plaintiff does not contend that she did not receive the supporting papers in a timely manner before the final submission date of the motion, and plaintiff does not claim any prejudice. Therefore, the Court disregards the alleged irregularity in the service of defendants' opposition papers. CPLR 2001.

Having reviewed plaintiff's demand, defendants' response, and the motion papers, the Court finds that defendants have produced the documents sought in request nos. 10, 17, and 27 of plaintiff's demand. See Kantor Opp. Affirm., Exs I, M, and N.

Request no. 4 is similar to request no. 27, in that plaintiff seeks any and all documents regarding the sales performance of all CCS sales personnel. The only difference is that request no. 4 seeks a broader period, from 1996-2005. However, the time frame of this request is overly broad. Plaintiff does not allege that he should have received a benefit that co-workers received based on sales performance. Thus, the only relevance of the discovery sought is to rebut the allegation that plaintiff's work was unsatisfactory, which was not allegedly raised until after plaintiff's heart attack. Therefore, plaintiff is entitled to discovery in request no. 4 only for the years 2002 through 2005. With this limitation, request no. 4 is identical to request no. 27, which defendants complied with.

The Court sustains defendants' objection to request no. 34, which seeks documents relating to defendants' attendance sign in procedures, is sustained. The amended verified complaint does not allege that plaintiff suffered discrimination as a result of these procedures.<sup>1</sup> Defendants' objection to request no. 44, to the extent that plaintiff seeks documents as to the starting compensation of salespeople hired after plaintiff resigned, is also sustained. Plaintiff has not demonstrated that the documents sought in request nos. 34 and 44 are either relevant, or reasonably calculated to lead to

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<sup>1</sup> Plaintiff submitted no bill of particulars in support of his motion.

admissible evidence as to the issues in this action.

Defendants' objection to the production of defendant Dougherty's personal income tax returns is sustained. Plaintiff seeks these returns to determine the commissions that Dougherty received, for plaintiff asserts that Dougherty testified that he also received a commission from sales. Harris Reply Affirm. ¶ 22. However, discovery as to personal tax returns is disfavored, and plaintiff has not demonstrated that the information contained in Dougherty's personal tax returns "is indispensable to this litigation and unavailable from other sources" (Nanbar Realty Corp. v Pater Realty Co., 242 AD2d 208, 209 (1<sup>st</sup> Dept 1997), such as company records. Indeed, plaintiff has obtained from defendants information about the commissions of other sales personnel. See Kantor Opp. Affirm., Ex I.. Although plaintiff seeks punitive damages from Dougherty, plaintiff is not entitled to this financial disclosure solely to support a claim of punitive damages at this stage of litigation. Suozzi v Parente, 161 AD2d 232 (1<sup>st</sup> Dept 1990). Therefore, plaintiff's motion is denied as to request no. 42.

Request no. 48, which demands documents that defendants intend to produce at trial or as part of any motion for summary judgment, is palpably improper on its face. Plaintiff is entitled to discover any relevant evidence and material reasonably calculated to lead to admissible evidence, but not in a manner that would bear on the legal strategy of defendants.

Request nos. 7, 8, and 9 concern Margaret Louisor Percy, an African American woman who started with CCS in 2001 as a benefits consultant. See Kantor Opp. Affirm., Ex C [Percy EBT], at 34. Request no. 7 seeks any documents relating to, among other things, various positions in CCS that Percy held from the time that she replaced plaintiff. Request no. 8 seeks documents relating to the compensation of any CCS employee who held any position immediately prior to the assumption

of his/her job responsibilities by Ms. Percy. Request no. 9 seeks documents relating to Ms. Percy's resignation.

Plaintiff seeks compensation and employment information for Percy because she is an African-American whose testimony, plaintiff argues, suggests that defendants discriminated against her. Harris Reply Affirm. ¶ 26. Defendants argue that Percy's own testimony reveals that she is not similarly situated, to which plaintiff responds that the issue of whether a person is similarly situated for the purposes of discrimination claims ordinarily presents an issue of fact. See Graham v Long Is. R.R., 230 F3d 34 (2d Cir 1999).

Whether Percy might have been treated differently from other employees does not establish whether plaintiff himself was treated differently on the basis of race, color, national origin or disability. Nothing in the record indicates that Percy claims that she was treated differently in the same manner as plaintiff, or that such treatment was based on her race or color. Defendants' alleged disparate treatment appears to have impacted only plaintiff among the sales personnel. The amended verified complaint states that plaintiff was the only African American sales broker employed by CCS at all times alleged in the amended complaint. See Amended Verified Complaint ¶ 14. To rebut the employer's purported nondiscriminatory explanation of disparate treatment, a plaintiff may use statistical evidence regarding an employer's general practices. Gray v Robert Plan Corp., 991 F Supp 94, 104 (ED NY 1998). Assuming that plaintiff sought information about Percy for this purpose, plaintiff and Percy would not constitute a large enough sample probative of an inference of discriminatory intent. Ibid. Therefore, defendants' objection to request nos. 8 and 9 are sustained, because the information sought is neither relevant nor reasonably likely to lead to admissible evidence as to the issues of plaintiff's alleged discrimination.

Inasmuch as plaintiff claims that Percy was his replacement, discovery of Percy's work history and her compensation when she replaced plaintiff could reasonably lead to admissible evidence on the issue of the qualifications necessary for the plaintiff's position, and evidence of benefits that plaintiff claims he should have received. If CCS gave Percy compensation that plaintiff did not receive, that might tend to undermine plaintiff's contention that he was denied that compensation due to his race or color. Therefore, defendants must comply with request no. 7, except as to information about Percy's raises and commissions prior to the time that Percy replaced plaintiff.

As to request nos. 3 and 31, which seek documents relating to the salary history and compensation of all CCS sales personnel from 1996 through 2005, defendants claim that Doug Rabbino (specifically mentioned in request no. 3 as "Rubbino") is not in sales, and therefore is not similarly situated. Plaintiff contends that Rabbino received commissions. As plaintiff indicates, the issue of whether a person is similarly situated for the purposes of discrimination claims ordinarily presents an issue of fact. See Graham, 230 F3d 34, supra. Given the unrebutted contention that Rabbino received commissions, plaintiff is entitled document discovery concerning Rabbino's salary history and compensation. However, as defendants indicate, the requests are overly broad. Discovery as to the salary history and compensation of all CCS sales personnel should be limited to the years 2002 through 2005.

Defendants' objections to requests nos. 32 and 41 are overruled. Documents evidencing the CCS's total revenue for 2002 through 2005, and the corporate tax returns, are relevant to the issue punitive damages. The documents sought are reasonably calculated to lead to admissible evidence as to the salary or compensation paid to the sales personnel, and to the number of shares of stock and

documents responsive to some requests at issue on this motion. However, given defendants' prior noncompliance with CPLR 3122 (c), defendants are directed to organize and label any further discovery responses either as they have been kept in the regular course of business, or to correspond to plaintiff's requests for the remaining course of this action, including the documents sought in request nos. 3, 7, 31, 32, and 41.

As to the cross motion, defendants request a further EBT of plaintiff regarding documents produced after the EBT. Defendants' cross motion has been resolved at a compliance conference in accordance with the parties' so-ordered stipulation dated September 20, 2007. In sum, defendants agreed to serve interrogatories in lieu of the additional EBT, and that the interrogatories would be limited to those post-EBT documents produced. Plaintiff agreed to respond to defendants' interrogatories within 25 days after receipt thereof.

Accordingly, it is hereby

**ORDERED** that plaintiff's motion to compel is granted to the extent that defendants must produced within 25 days, the documents sought in request nos. 3, 7, 31, 32, and 41 of plaintiff's demand for production of documents, and the motion is otherwise denied; and it is further

**ORDERED** that defendants' cross motion to compel a further EBT of plaintiff is resolved according to the parties' so-ordered stipulation dated September 20, 2007.

This opinion constitutes the decision and order of the Court.

**Dated:** 12/14/07  
New York, New York

**ENTER:**

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NEW YORK  
J.S.C. CLERK'S OFFICE  
DEC 14 2007

**FILED**