Lapsley v Sorfin Intl. Ltd.
2008 NY Slip Op 31243(U)
April 17, 2008
Supreme Court, Nassau County
Docket Number: 5438-05/
Judge: Karen Veronica Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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JAMES LAPSLEY,

Plaintiff(s),

-against-

SORFIN INTERNATIONAL, LTD.,

Defendant(s).

---x

Index No. 15438/05

Motion Submitted: 2/11/08
Motion Sequence: 006

The following papers read on this motion:

Notice of Motion/Order to Show Cause........................X
Answering Papers...X
Reply...
Briefs: Plaintiff's/Petitioner's.......................................X
Defendant's/Respondent's.................................XX

The defendant Sorfin International, Ltd., moves this Court for an order, pursuant to CPLR § 3212, dismissing the plaintiff's complaint.

The plaintiff James Lapsley claims that in July 2005, after some 19 years of service, he was constructively terminated from his employment at age 61 and subjected to age discrimination by his employer, defendant Sorfin International, Ltd., a company specializing in the "global automotive battery industry ["Sorfin" or the "defendant"](Cmplt., ¶¶ 11-12, 26, 28; Lapsley Aff., ¶ 2).

Lapsley who had served as a Sorfin Vice-President and owned 10% of Sorfin's outstanding stock resigned from his position in July of 2005 and relocated to Maryland thereafter. Lapsley claims, however, that he was constructively discharged after, *inter alia*, his salary was reduced in 2002 by some 50%; his duties were "stripped" from him and given to younger staff members; and his work responsibilities were limited to menial tasks over the

ensuing years, thereby creating an intolerable work environment (Plaintiff's Brief at 4-5; Cmplt.,¶¶ 22-26; Lapsley Aff., ¶¶ 9-14).

Based on these and additional claims of wrongdoing, Lapsley commenced the within action in September of 2005, alleging aged-based discrimination in violation of Executive Law §§ 291, 296, *et., seq.*

Sorfin has answered, denied the material allegations and interposed various counterclaims and affirmative defenses, including its "fourth affirmative defense and counterclaim," which avers, *inter alia,* that commencing in 2000, the plaintiff's work skills and level of performance began to erode; that in 2002, his salary and job duties were substantially reduced as a consequence; but that in an effort to be humane and in recognition of his prior long-standing service * * * management decided not to terminate his employment" (Ans.,¶¶ 10-14; Fink Aff.,¶¶ 9-12).

Discovery is substantially complete and Sorfin now moves for summary judgment dismissing the complaint.

In sum, and according to Sorfin, the reduction in the plaintiff's salary and/or job responsibilities, was not the product of discrimination, but rather, occurred for legitimate non-discriminatory business reasons; namely, Lapsley's allegedly poor work performance.

It is settled that "to prevail on a motion for summary judgment, an employer 'must demonstrate either the employee's failure to establish every element of intentional discrimination, or having offered legitimate, nondiscriminatory reasons for the challenged action the absence of a material issue of fact as to whether its explanations were pretextual'"(***Bailey v. New York Westchester Square Medical Centre***, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30 (1st Dept., 2007), quoting from, ***Messinger v. Girl Scouts of U.S.A.***, 16 A.D.3d 314, 792 N.Y.S.2d 56 (1st Dept., 2005); see, ***Forrest v. Jewish Guild for the Blind,*** 3 N.Y.3d 295, 305, 819 N.E.2d 998, 786 N.Y.S.2d 382 (2004); ***Ferrante v. American Lung Assn.***, 90 N.Y.2d 623, 629-630, 687 N.E.2d 1308, 665 N.Y.S.2d 25 [1997] see also, ***Stephenson v. Hotel Empls. + Rest. Empls. Union Local 100 of AFL-CIO,*** 6 N.Y.3d 265, 844 N.E.2d 1155, 811 N.Y.S.2d 633 [2006]).

Viewing the evidence adduced "in the light most favorable to * * * [the plaintiff], as is appropriate in the context of * * * [a] motion for summary judgment" (***Fundamental Portfolio Advisors, Inc. v. Tocqueville***, 7 N.Y.3d 96, 105 - 106, 850 N.E.2d 653, 817 N.Y.S.2d 606 [2006]), and applying the relevant evidentiary burdens established the Court of Appeals (***Stephenson v. Hotel Empls. + Rest. Empls. Union Local 100 of AFL-CIO, supra; Ferrante v. American Lung Assn., supra***), the Court concludes that the plaintiff has raised a triable issue of fact with respect to his age discrimination claims.

[* 3]

Here, the plaintiff has discharged his concededly "*de minimis*" or "low threshold" *prima facie* burden of showing age discrimination (***Singh v. State Office of Real Property Services***, 40 A.D.3d 1354, 1356, 837 N.Y.S.2d 378 (3d Dept., 2007); ***Wiesen v. New York University***, 304 A.D.2d 459, 460, 758 N.Y.S.2d 51 [1st Dept., 2003]), by adducing proof of, *inter alia*, his membership in a class protected by the statute and his qualifications for the subject position; an alleged constructive discharge (see, ***Morris v. Schroder Capital Management Intern.***, 7 N.Y.3d 616, 621-622, 859 N.E.2d 503, 825 N.Y.S.2d 697 (2006); ***Cahn v. Lamb***, 274 A.D.2d 405, 406, 711 N.Y.S.2d 779 (2d Dept., 2000); ***Romano v. Basicnet, Inc.***, 238 A.D.2d 910, 911, 661 N.Y.S.2d 135 (4th Dept., 1997), and further proof that the claimed discharge "occurred under circumstances giving rise to an inference of age discrimination" (***Ferrante v. American Lung Assn., supra***, at 629; ***Anagnostakos v. New York State Div. of Human Rights***, 46 A.D.3d 992, 993, 846 N.Y.S.2d 798 [3d Dept., 2007]).

More specifically, and with respect to the latter criterion, the plaintiff, then the oldest Sorfin sales employee (Lapsley Aff.,¶ 9) has tendered evidence indicating, among other things, that his employment duties were transferred to younger personnel (cf., ***Carlton v. Mystic Transp., Inc.***, 202 F.3d 129, 135 (2nd Cir., 2000); ***Bemis v. New York State Div. of Human Rights***, 26 A.D.3d 609, 611-612, 809 N.Y.S.2d 274 (3d Dept., 2006); that one of Sorfin's principals inquired whether the plaintiff had considered retiring (***Anagnostakos v. New York State Div. of Human Rights, supra***, at 993; ***McCluskey v. County of Suffolk***, 9 Misc.3d 1106(A), 806 N.Y.S.2d 446 (Sup. Ct., Nassau Co., 2005); that his duties were reduced and salary was drastically reduced by some 50% (***Anagnostakos v. New York State Div. of Human Rights, supra***, at 993, that no contemporaneously authored, negative performance reviews exist (***Carlton v. Mystic Transp., Inc., supra***, at 137); and that despite his long-term tenure, extensive experience and status as a Vice-President, he was allegedly assigned demeaning tasks, ignored and disregarded in the office in the years preceding his separation from employment.

Although the defendant contends that the plaintiff's constructive termination claim is defective as a matter of law, considering among other things, "the cumulative effect of [the alleged] adverse conditions" (***Ruhlmann v. Ulster County Dept. of Social Service***, 234 F.Supp.2d 140, 179 (N.D.N.Y., 2002), whether the plaintiff's employment became "so intolerable that he * * * was forced into involuntary resignation" (***Nelson v. HSBC Bank USA***, 41 A.D.3d 445, 447, 837 N.Y.S.2d 712 (2007)), presents a question of fact that cannot be summarily resolved on the record before the Court (accord, ***Cahn v. Lamb, supra; Romano v. Basicnet, Inc., supra***; ***Fischer v. KPMG Peat Marwick***, 195 A.D.2d 222, 607 N.Y.S.2d 309 (1st Dept., 1994); ***Graham v. Kimber Mfg., Inc.***, 2002 WL 181698 at 4 (S.D.N.Y., 2002) cf., ***Rosario v. National Housing Partnership Property Management, Inc.***, 1998 WL 146207 at 4 (S.D.N.Y. 1998) ["Whether a constructive discharge has occurred is a question of fact to be determined by the trier of fact"] (see also, ***Chertkova v. Connecticut General Life Ins. Co.***, 92 F.3d 81, 89-90 [2nd Cir., 1996]).

The fact the original salary reduction occurred in 2002 – as opposed to the allegedly on-going nature of the plaintiff's degrading work assignments – is not determinative, since "the passage of time by itself is not dispositive in a constructive discharge claim * * *" (***Gonzalez v. Bratton***, 147 F.Supp.2d 180, 198 (S.D.N.Y., 2001), *affd,* 48 Fed. Appx. 363 [2nd Cir. 2002]). Indeed, "the question of whether the temporal relationship between the forced resignation and the harassment is too distant is a matter properly left to the trier of fact" (***Gonzalez v. Bratton, supra***, at 198).

While in response to this *prima facie* showing, the defendant has identified a facially legitimate and/or nondiscriminatory rationale for its conduct, *i.e.*, the assertion that the plaintiff's employment skills had allegedly eroded, there are virtually no contemporaneous, written documents that evidence the plaintiff's alleged skill deterioration, or the purported series of errors identified by the defendant (Fink Aff., ¶¶ 10-11; Lapsley Aff.,¶¶ 19-29)(see, ***Carlton v. Mystic Transp., Inc., supra***, at 137 cf., ***Bemis v. New York State Div. of Human Rights, supra***).

Indeed, the defendant has not submitted a single, contemporaneously authored document in which it affirmatively expressed dissatisfaction with the plaintiff's work or negatively reviewed his performance (***Carlton v. Mystic Transp., Inc., supra***, at 137). Paul Fink's supporting affidavit contains no assertion that he or anyone else ever informed Lapsley that his work was deficient or that his skills had deteriorated. The plaintiff has asserted without material dispute, that no one at Sorfin ever criticized his performance "either verbally or in writing" and that no mention of poor work performance was made when he was informed that his salary was being reduced (Lapsely Aff., ¶ 19).

In any event, and even assuming that the defendant's proof was sufficient to rebut the plaintiff's *prima facie* showing, the plaintiff has, in turn, discharged his responsive burden by raising a factual issue with respect to whether the defendant's "stated reasons were false and that discrimination was the real reason" for the allegedly discriminatory conduct (***Forrest v. Jewish Guild for the Blind*, supra**, at, 305; ***Ferrante v. American Lung Assn., supra,*** at 629-630; ***Singh v. State Office of Real Property Services, supra***). Notably, "to meet this burden, the plaintiff may rely on evidence presented to establish his prima facie case as well as additional evidence", which "may include direct or circumstantial evidence of discrimination" (***Catalano v. Lynbrook Glass & Architectural Metals Corp.***, 2008 WL 64693 at 7 [E.D.N.Y., 2008]).

Reviewing the facts within the totality of the circumstances, and accepting that "'discrimination is rarely so obvious or its practices so overt that recognition of it is instant and conclusive * * *'" (***Ferrante v. American Lung Assn., supra***, at 631; ***300 Gramatan Ave. Assocs. v. State Div. of Human Rights***, 45 N.Y.2d 176, 183, 379 N.E.2d 1183, 408

N.Y.S.2d 54 (1978); ***Chertkova v. Connecticut General Life Ins. Co., supra,*** at 87), the Court concludes that triable issues have been presented, which preclude any award of summary judgment.

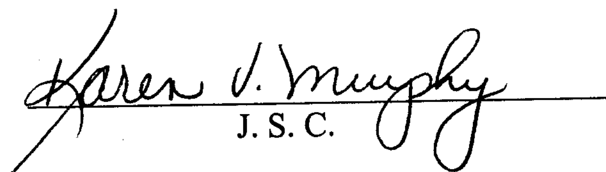
Further, to the extent that the parties have advanced conflicting assertions and claims relative to stated events and occurrences, "[i]t is not the court's function on a motion for summary judgment to assess credibility" (***Ferrante v. American Lung Assn., supra***, at 631), or to resolve disputed factual assertions and contentions. "Issue finding, rather than issue determination, is the key to summary judgment" (In re ***Cuttitto Family Trust,*** 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept., 2004); *see,* ***Paulin v. Needham***, 28 A.D.3d 531, 812 N.Y.S.2d 658 [2d Dept., 2006]).

Accordingly, it is,

ORDERED that the motion pursuant to CPLR § 3212 by the defendant Sorfin International, Ltd. for an order dismissing the plaintiff's complaint, is denied.

The foregoing constitutes the decision and order of the Court.

Dated: April 17, 2008
Mineola, N.Y.


J. S. C.

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