

**Sciarresi v Libutti**

2008 NY Slip Op 32443(U)

September 3, 2008

Supreme Court, New York County

Docket Number: 0107430/2007

Judge: Edward H. Lehner

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

EDWARD H. LEHNER

PRESENT: \_\_\_\_\_

PART 19

Justice

Index Number : 107430/2007  
**SCIARRESI, ANDREA**  
 vs.  
**LIBUTTI, GIULIA**  
 SEQUENCE NUMBER : 001  
 DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this 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

with accompanying memorandum decision  
motion is decided in accordance

**FILED**  
SEP 08 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: SEP 03 2008



J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 19

-----X  
ANDREA SCIARRESI,

Plaintiff,

- against -

GIULIO LIBUTTI, PEIRANDREA GALLI, MARIO  
D'ANGELO and ALITALIA LINEE AEREE  
ITALIANE, SpA,

Defendants.

-----X  
EDWARD H. LEHNER, J.;

Index No.  
107436

**FILED**  
SEP 08 2008  
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NEW YORK

Before the court are motions by: i) Mario D'Angelo to dismiss the action for lack of jurisdiction, and ii) all defendants to dismiss the complaint against them pursuant to CPLR 3211(a) 7 for failure to state a cause of action. The motion by D'Angelo was granted on consent at oral argument (tr. p. 9).

Plaintiff's complaint has five causes of action: i) discrimination and retaliation in violation of the New York City Human Rights Law; ii) negligent supervision of employees of defendant Alitalia Linee Aerre Italiane, SpA ("Alitalia"); iii) disability discrimination; iv) negligent/intentional infliction of emotional distress, and v) prima facie tort.

Plaintiff alleges that he was the Director of Human Resources for Alitalia based in New York (Id. p. 10). Defendant Libutti was Alitalia's head of North American operations and defendant Galli was the prior head of such operations (Id. pp. 9-10).

February 2004 to September 2004 (¶¶ 12, 16, 19, 21), any intentional tort claim is barred by the statute of limitations; that conduct occurring after plaintiff's transfer to Rome is beyond the scope of New York City's Human Rights Law; that plaintiff has not made out a claim for retaliation; that negligent hiring and retention are barred by the Workers' Compensation Law; and that plaintiff has not adequately alleged a claim for disability discrimination.

Plaintiff, who "was and is a citizen of the Republic of Italy" (Id. ¶ 1), was transferred to Rome in November 2005 and contends that he is being retaliated against there (Id. ¶ 35). However, "(u)nder both New York State law and the New York City Administrative Code, applicability of the (New York City Human Rights Law) is limited to acts occurring within the boundaries of New York City" [Shah v. Wilco Systems, Inc., 27 AD3d 169, 175 (1<sup>st</sup> Dept. 2005)]. See also, Iwankow v. Mobil Corp., 150 AD2d 272 (1<sup>st</sup> Dept. 989). Therefore, Alitalia's alleged conduct toward plaintiff in Rome does not state a viable claim.

"In order to make out the claim (for retaliation), plaintiff must show that (1) (h)e has engaged in protected activity, (2) (his) employer was aware that (he) engaged in such activity, (3) (he) suffered an adverse employment action based upon (his) activity, and that there is a causal connection between the protected activity and the adverse action" [Forrest v. Jewish Guild for the Blind, 3 NY3d 295, 312-313 (2004)]. Plaintiff has alleged hostile treatment and verbal abuse. However, he has not alleged

sufficient facts to state a viable claim applying the aforementioned legal requirements as he has not shown that any adverse action occurred because he engaged in a protected action. Thus, the first cause of action is dismissed.

Plaintiff's second cause of action "for negligent hiring and retention must ... be dismissed due to the exclusivity of remedy under Workers' Compensation Law §§ 11 and 29(6)" [Conde v. Yeshiva University, 16 AD3d 185, 187 (1<sup>st</sup> Dept. 2005)].

Plaintiff's third cause of action for disability discrimination under the New York City Human Rights Law fails to state facts showing such discrimination. "To state a prima facie case of employment discrimination due to a disability under both the Executive Law and the Administrative Code, a plaintiff must show that he or she suffered from a disability and the disability caused the behavior for which he or she was terminated" [Timashpolsky v. State University of New York, 306 AD2d 271, 272 (2<sup>nd</sup> Dept. 2003)]. See also, McEniry v. Landi, 84 NY2d 554 (1994).

Here, the claimed violation of the City Human Rights Law was the failure of defendant to "manage and supervise its employees to refrain from engaging in the very same behavior that caused plaintiff's hospitalization and subsequent treatment" (complaint ¶ 53). This lack of supervision claim is thus similar to the second cause of action and is therefore dismissed for the same reason.

To the extent plaintiff claims a hostile work environment, it has been stated that "a ... hostile work environment exists 'when the workplace is permeated with

discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment' .... A hostile work environment requires 'more than a few isolated incidents'" [Forrest v. Jewish Guild for the Blind, supra at pp. 310-311]. Plaintiff has alleged only a few incidents and not a pattern of objectively hostile conduct.

With respect to plaintiff's fourth cause of action for "negligent/intentional infliction of emotional distress," [l]iability has been found only where the conduct has been so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" [Fischer v. Maloney, 43 NY2d 553, 557 (1978)]. See also, Howell v. New York Post Company, Inc. 81 NY2d 115, 122 (1983). Plaintiff has not alleged that Alitalia's conduct has been so outrageous. Moreover, plaintiff's allegations assert only intentional wrongdoing, and thus are time barred, since the alleged wrongful conduct occurred in 2004 and he did not commence the federal court action until May 9, 2006. "A claim for damages for an intentional tort ... is subject to a one year limitation period" [Havell v. Islam, 292 AD2d 210 (1<sup>st</sup> Dept. 2002)].

Plaintiff's fifth cause of action for prima facie tort is dismissed since "there is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful conduct" [Burns Jackson Miller Summit & Spitzer v. Lindner, 59

NY2d 314, 333 (1983)]. See also, *Naturman v. Crain Communications, Inc.*, 216 AD2d 150 (1<sup>st</sup> Dept. 1995). Plaintiff has not alleged that malevolence is the sole motive for Alitalia's actions. Further, he has not sufficiently alleged special damages. See, *Freihofer v. Hearst Corporation*, 65 NY2d 134, 143 (1985); *Di Santo v. Forsyth*, 258 AD2d 497 (2<sup>nd</sup> Dept. 1999).

In sum, defendants' motion to dismiss the complaint is granted and the Clerk is directed to enter judgment accordingly.

Dated: September 3, 2008

  
\_\_\_\_\_  
J.S.C.

**FILED**  
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