

Matz v Prospect Energy Corp.

2008 NY Slip Op 33089(U)

November 13, 2008

Supreme Court, New York County

Docket Number: 109217/07

Judge: Herman Cahn

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Cahn

PART 49

Index Number : 109217/2007

MATZ, HOAWRD J.

vs

PROSPECT ENERGY CORP.

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were filed in 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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

FILED

NOV 19 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/13/08

[Signature]

J.S.C.

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

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: I.A.S. PART 49

-----X
HOWARD J. MATZ,

Plaintiff,

-against-

Index No. 109217/07

PROSPECT ENERGY CORPORATION,
PROSPECT CAPITAL CORPORATION,
PROSPECT CAPITAL MANAGEMENT LLC,
PROSPECT ADMINISTRATION LLC, JOHN
F.BARRY, III, in his individual and official
capacities, and DARIA BECKER in her individual
and official capacities,

Defendants.

-----X

HERMAN CAHN, J:

Defendants move to dismiss the complaint, CPLR 3211 (a) (1) and (7).

Background:

In this action the plaintiff, Howard Matz, a job applicant for a senior management position with the defendant Prospect Energy Corporation, alleges that defendants refused to hire him after they learned, during a reference check, that he was a homosexual male.

Matz is a senior finance professional with significant experience in energy-related deals. Defendants Prospect Energy Corporation, Prospect Capital Corporation, Prospect Capital Management LLC and Prospect Administration LLC (together Prospect) are affiliated companies engaged in the business of energy finance, including investing in energy-related companies. Defendant John F. Barry III (Barry) is the Chairman and CEO of Prospect; defendant Daria Becker is Barry's wife and an officer of Prospect.

In the fall of 2006, defendants engaged in an extensive interview process with Matz in

connection with his being considered for a position with Prospect. The process included several interviews and assigning him trial projects in order for Prospect to test his skills and abilities. Throughout the process, defendants gave him positive feedback. On November 21, 2006, Matz attended a meeting with Barry in which the final details of his possible employment were discussed.

Matz claims he was offered a position as Managing Director at Prospect, with an annual salary of \$150,000, and was informed that his employment would commence on December 1, 2006, once the company completed some reference checks and other hiring formalities (Compl, ¶ 26).

Thereafter, on November 27, 2006, Daria Becker contacted one of Matz' references, Andreas Veith. During her conversation with Veith, Becker told Veith that Prospect was a small company and that it wanted to know more about Matz; specifically what sort of relationship Matz was in and with whom he was living (Compl, ¶ 33). Veith responded that Matz was gay, that he had lived with his current partner for years, and that this was known at his prior workplace without any issues. Becker allegedly thanked Veith for his "open" conversation and commented that her impression of Matz had been confirmed (Compl, ¶ 35). Becker also asked a second reference about Matz' sexual orientation (Compl, ¶ 35).

Matz alleges that defendants' positive opinion of him changed dramatically after learning of his sexual orientation, and they ultimately did not hire him as a result (Compl ¶ 37). On November 28, 2006, the day after defendants discovered Matz' sexual orientation, John Barry sent Matz a markedly less positive e-mail than his prior correspondence. Barry had previously expressed an interest in concluding the hiring process by December 1st , but in his November 28th

e-mail Barry now stated his concern that the process was being rushed (Compl, ¶ 39). In an e-mail dated November 30th, Barry indicated that Prospect had hired another individual for a position comparable to the job intended for Matz and that the new hire was starting December 1, 2006 (Compl, ¶ 46).

Based upon these allegations, Matz alleges four causes of action: Discrimination in violation of New York Executive Law § 296 (a) (1) (the New York State Human Rights Law [NYSHRL]) (first cause of action); Discrimination in violation of New York City Administrative Code § 8-107 (1) (a) (NYCAC) (second cause of action); Aiding and abetting violations of NYSHRL (third cause of action); and Aiding and abetting violations of NYCAC (fourth cause of action).

Defendants move to dismiss the complaint arguing, first, that Matz has not stated a prima facie case of discrimination in that the e-mails between him and defendants indicate that defendants' failure to hire Matz did not occur under circumstances giving rise to an inference of discrimination and, second, that Matz abandoned the hiring process after November 30th. Defendants point out that their entire dealings with Matz occurred over a ten-day period around the 2006 Thanksgiving-day weekend.

Defendants submit the e-mails between themselves and Matz sent prior to November 28th, the date on which Daria Becker assertively asked Veith about Matz' sexual orientation. Defendants contend that these e-mails indicate Matz' desire to assume that he had been hired and the defendants' growing hesitancy concerning him. They argue that the e-mails show that no offer of employment had been made or agreed to.

On Saturday, November 18, 2006, Matz sent Grier Eliasek, President and COO of

Prospect Energy Corporation the following e-mail message:

I enjoyed meeting with you and some of the other members of the Prospect team yesterday. I was really very impressed with what I learned about Prospect, its business and the personality of the organization

As next steps, I will send over to you a sample of my [sic] some of my work and a few references. I will also take a look at the Thermon management presentation and shoot over to you some of by thoughts . . . probably tomorrow

On Wednesday, November 22, 2006, Matz sent Barry the following message:

John and Daria,

I want to wish you and your family a Happy Thanksgiving.

I also want to thank you very much for inviting me to join your team. I am really excited about the prospect of working with Prospect. Thanks . . .

On Friday, November 24, 2006, Barry responded to Matz as follows:

Howard, we too are excited to move forward. Although this is moving very fast, and I am glad for that, we do have to be sure we are not rushing past some key diligence items.

We still have a number of boxes to check, as follows:

1. Please continue to work on the deals that Grier has given you. It is important to all of us that we verify first hand your ability to analyze and close a deal, hopefully as a senior member of the team supervising others who are galvanized by your example. I think Grier has given you two deals. I hope he gives you more, so we all have a more complete experience working with you . . .
2. We need your references to call, including former bosses. We will try to call as soon as we can.
3. Catherine has a questionnaire for you to fill out and a checklist of items. . . .

On the same day, Matz responded as follows:

John,

1) I already provided a list of references to Grier and am completing his employment application.

2) I have a call scheduled for Monday on INDY. Eric tells me that the information for Thermon is coming shortly. Is there another deal you want me to get started with besides the WDF Nagelbush deal with Mark?

3) I am planning to come into the office on Monday or Tuesday of next week, at Daria's convenience, to complete new employee paperwork. Daria: Please let me know what time works best for you (emphasis added).

Several hours later on November 24, 2006, Grier Eliasek e-mailed Matz as follows:

Howard, I have not seen those references. Pls forward so someone can call them, thanks.

I'm not sure where the new employee language is coming from, as we are not there yet. Perhaps there was some miscommunication [sic]. We want to see you more "in action" (emphasis added).

Later that same day, Matz e-mailed as follows:

John,

Would you bring Grier up to date on our conversation?

Thanks

Barry responded as follows:

Howard, he is up to date, with conversations and emails, including my email this morning, which I think laid out where we are in this process.

If Grier is saying anything that suggests he is not up to date, please advise. Thanks.

In response Matz e-mailed Barry the following message:

John,

Gee, I am a little puzzled. **When we met last week, I was under the impression that you offered me a position as Managing Director with a base salary of \$150,000, commencing on December 1, 2006,** subject only to your due diligence on me and the completion of the application and other formalities.

I resent the email from November 18, regarding references to Grier, just a short while ago.

Your response to my acceptance was to invite Daria and Catherine into your office to advise them that I was joining Prospect, so that they would commence on implementing the mechanics associated with my hire.

While I respect your need to complete your due diligence on me and other related formalities, I have two other offers that I need to respond to and intended to turn down, based on our conversation.

I certainly want to clear the air on this, since I am expecting a follow up call from one of the other firms this weekend.

You can reach me on my cell phone tomorrow if you would rather have a conversation. I have really enjoyed working with Prospect so far, and look forward to engaging fully and officially with you (emphasis added).

Barry responded as follows, still on November 24, 2006, at 8:51 PM:

Howard, I think you have to accept the other offer, not because I want that to happen, but because I see no other way.

For us, hiring decision are hugely significant investments. Sometimes, I think they are more important to us than to the person being hired (if you can believe that).

I think we met for the first time last week. I am not sure of the day. The oldest email I have from you, my method of all serious

communication, is six days ago. The last three days have been Thanksgiving days, although I have worked on each day, as I always do.

At this point, we have not yet called your references. Daria is handling that. An important decision like this, bringing someone of your stature and reputation into our firm, is a decision of such significant that we know we have to go through all the preliminaries to make sure we are on the right track

By the way, all the feedback we are getting is very positive. That speaks very well of you. We have no reason to believe that the references yet to be called will not be positive. Also, since people from time to time attack us, we are not unduly influenced by negative testimony, should there be any out there.

If we could stay on the precatory schedule I articulated to you, with the hope and objective that we could be working together and paying you December 1, six days from now, that would be great. A lot has to happen for us to stay on that schedule, starting with reference calls and the other items I mentioned in my email earlier today. I have no reason to believe all that cannot happen, or I would not have suggested that schedule. Although I could tell you that discussion with others have led me to believe that we cannot met that schedule, I have not said that. I do know that we are not in a position to make a legal confirm of employment today, when these other firms are calling you. I am sorry for that but prudence prevents me from changing it. I also have to tell you that people have asked me why we would take on a full time person December 1 just as the firm is shutting down for the year. I think we can answer that question, but it is a legitimate one.

While I understand the awkwardness of responding to expiring offers while we do our work (yes, I have been in that very difficult position before), **I don't believe that we can speed our processes any more than we have. Others at Prospect are unsure that moving so quickly, within a week, with respect to you is not hasty.** (emphasis added).

Thus, it is clear that at this point, no offer of employment had been made.

Later that night, Matz responded:

John,

Thank you for getting back to me. I certainly appreciate your wish to get totally comfortable with me as a new hire and to complete your diligence to your satisfaction. I'm sure you will enjoy your conversations with my references

So lets stay on the schedule we discussed. From my end, I will work to defer the timing of my response to my other offers

On Monday November 27, 2006, defendant Daria Becker contacted Andreas Veith, one of Matz' references. Matz alleges that Becker improperly asked about his sexual orientation.

The next day, Tuesday, November 28, 2006, Barry wrote to Matz, in part as follows:

. . . we are continuing to go through our review of your interest in Prospect, our needs, the feedback of our people, whether and where there is a fit, etc., as we said we would. However, it is not going as quickly as I would like, and I am not able to speed it up any more than I have. In fact, the process is going more slowly that [sic] I had hoped.

Grier and several of our people are now consumed and traveling out of town on investments, and so he is not able to focus on you at this point either Grier has told me that he wants to work with you on real projects so that he has a sense of your abilities

Because of the other offers you have, and the fact that you feel pressure to respond, I want to ask you once again to accept one of the other offers. I would feel better removing that source of pressure from our decision making process at what is already a difficult time of year for major commitments, which you would be for us

On November 29th, Matz responded as follows:

John,

After rereading your email of yesterday a few times, I am again confused by your mixed signals. I was looking forward to the opportunity to join your team and it was and is clear to me that Prospect is exactly the type of firm that I am interested in joining. Unfortunately, I was no longer able to defer my decision with regard

to another lucrative offer and had to either commit or turn it down. I did turn it down. I think Prospect offers to me the most interesting and exciting opportunity. I also turned down the offer in light of the expectations you explicitly raised, your enthusiastic, positive feedback

On Thursday, November 30, 2006, Barry responded to Matz as follows:

Howard, thanks for this.

I have given your email careful thought for the last 24 hours

First, our business is built on communication. I am not sure if our communication is what it needs to be When you were in my office, I did not verbally “offer” you a job that you “accepted.” The suggestion that you later made in writing, that something like that although not exactly that, occurred, put me on guard. I immediately wrote back to you, telling you in writing: “Howard, I think you have to accept the other offer, not because I want that to happen, but because I see no other way.” Besides these communication issues, I am also concerned by the pressure that I feel you are applying to me to make you an offer of employment

I think I understand why you have pursued employment with us and why you have pushed for a fast track evaluation process. I am not sure why you let another “lucrative” offer expire, without emailing me that was about to happen, after I wrote that you should take the other offer; but now my too late learning of that, combined with weak communication, has put me on edge. I have never seen this happen before, where a job applicant places subtle pressures on a potential employer to extend a job offer. It makes me uncomfortable

Right now, I do not have the comfort level I need to bring you aboard. I am not saying I cannot develop it, but to do so will require a significant diminution in the pressure I am feeling, and a significant increase in our experience with you looking at deals. I have no problem with the consulting idea, but need to think about it. I also want to talk to Grier, Daria and certain others about it (emphasis added).

This was the last e-mail between the parties.

Discussion:

Both the NYCAC and the NYSHRL provide that it is unlawful for an employer to refuse to hire, or to discharge from employment, anyone on the basis of his or her sexual orientation (see Brennan v Met. Opera Assn., Inc., 284 AD2d 66 [1st Dept 2001]).

The plaintiff in an employment discrimination action bears the initial burden of establishing a prima facie case of discrimination by showing that: (1) he was a member of a protected group; (2) that he was qualified for the position he sought; (3) that he was denied the position; and (4) that the circumstances of the denial give rise to an inference of discrimination (Id. at 70, citing McDonnell Douglas Corp. v Green, 411 US 792, 802 [1973]). Once the plaintiff has establish a prima facie case, a presumption arises that the employer unlawfully discriminated against the plaintiff and the burden shifts to the defendant-employer to rebut the presumption by articulating some legitimate, non-discriminatory reasons to support its employment decision (Ferrante v American Lung Assn., 90 NY2d 623, 629-30 [1997]). The plaintiff may then respond with evidence that the proffered reason is a mere pretext for discrimination (Taylor v New York Univ. Med. Center, 2AD3d 244 [1st Dept 2003]).

Here, Matz has failed to meet his burden of establishing a prima facie case in that he has failed to show he was denied employment under circumstances giving rise to an inference of discrimination. The above e-mails clearly indicate that, contrary to Matz' assertion that defendants offered him a job, and then withdrew the offer when they discovered his sexual orientation, the defendants consistently asserted that they were not offering Matz a job, but rather, were interested in evaluating him by having him work on some projects. The e-mail of November 24th, three days prior to any contact with Matz' references, from Grier Eliasek to Matz

states: "I'm not sure where the new employee language is coming from, as we are not there yet. Perhaps there was some miscommunication [sic]." Matz then e-mails Barry: "Would you bring Grier up to date on our conversation?" Barry responds: "Howard, he is up to date, with conversations and emails" It is clear from the e-mails that no job had been offered this time.

Moreover, the e-mails document that Matz took an aggressive, high pressure tactic towards his potential employment with the defendants and that they rejected that tactic. After informing defendants of two other offers that he had waiting, the defendants informed Matz that he should accept the other offers, because they were not in the position to speed up the process of evaluating him any more than they already had.

Additionally, the defendants did not reject Matz or withdraw an offer of employment. Barry wrote to Matz in his e-mail dated November 30th, that there was a mis-communication regarding an offer of employment and that: "Right now I do not have the comfort level I need to bring you aboard. I am not saying I cannot develop it, but to do so will require a significant diminution in the pressure I am feeling"

Generally, on a motion to dismiss, the court will accept the facts alleged in the complaint as true, and accord the plaintiff the benefit of every possible inference (Morgenthau & Latham v Bank of N.Y. Co., 305 AD2d 74, 78, lv denied 100 NY2d 512 [2003]). However, where, as here the factual assertions are contradicted by documentary evidence, the plaintiff is not afforded that benefit (Bishop v Maurer, 33 AD3d 497 [1st Dept 2006], aff'd., 9 NY3d 910 [2007]).

Here, the documentary evidence clearly establishes that on November 24th, Plaintiff received multiple e-mails reiterating that no offer had been extended and even explicitly

informed him that “Howard, I think you have to accept the other offer” Thus, even affording Plaintiff the benefit of every reference, and accepting the facts as alleged in the complaint, as the Court must do on a motion to dismiss, the documentary evidence contradicts Matz’ claim that the November 27th conversation with one of his references dramatically changed Defendants’ positive view of him and resulted in his not being hired. Even if Plaintiff could prove the substance of the conversation, and establish that his sexual orientation was viewed negatively, he cannot establish that it was the basis for not being hired. The documentary evidence establishes that prior to any check of his references, Plaintiff succeed in raising other concerns about himself that were so significant that he was being told to accept an offer from another company. Plaintiff failed to credibly rebut this evidence.

Plaintiff now seeks discovery pursuant to CPLR 3211 (d). However, he has not set fourth what facts, if any, may exist to support his claim. As such, no discovery is granted.

Accordingly, it is

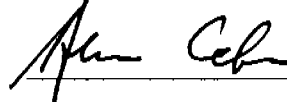
ORDERED that defendants’ motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: November 13, 2008

FILED
 NOV 19 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

ENTER:



J.S.C.