

Brook v Overseas Media, Inc.

2009 NY Slip Op 30268(U)

February 2, 2009

Supreme Court, New York County

Docket Number: 107439/07

Judge: Walter B. Tolub

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

PRESENT: WALTER D. TOLUB
Justice

PART 15

Index Number : 107439/2007

BROOK, HELEN

vs

OVERSEAS MEDIA

Sequence Number : 004

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE 9.5.2008

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

its motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision

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

FILED
FEB 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/2/09

WA JSB
WALTER D. TOLUB

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 15

-----x
 HELEN BROOK

Plaintiff,

Index No. 107439/07
 Mtn Seq. 004

-against-

OVERSEAS MEDIA, Inc.,
 Defendant.
 -----x

WALTER B. TOLUB, J.:

This action arises out of plaintiff's contention that she was discriminated against because of a physical disability.

By this motion, defendant Overseas Media, Inc., moves for leave to reargue this court's decision and order dated March 7, 2008, and upon re-argument, for an order dismissing plaintiff's second cause of action. In opposition, plaintiff Helen Brook cross-moves for leave to renew and reargue the same decision, and upon renewal and re-argument, for an order reinstating plaintiff's first cause of action for disability discrimination under the New York City and New York State Human Rights Law and plaintiff's third cause of action for retaliation (Cross-Motion, p. 11).

Facts

Briefly restated, plaintiff began working for defendant, a Russian television network, in June of 2004. Although initially working in an unpaid capacity, plaintiff was officially hired in 2005. Plaintiff was twice promoted in 2005, and began to write and produce two of defendant's television shows.

According to plaintiff's complaint, in Spring of 2006, she was diagnosed with carpal tunnel syndrome, and was instructed by her doctor to take short breaks and limit her typing. (Complaint at ¶8, ¶9). Plaintiff further claims that she advised her boss, George Tsikhiseli of her condition on May 30, 2006 by way of a memorandum and a doctor's note. As noted in this court's March, 2008 decision, the memorandum, in entirety, reads as follows:

To: Gerogiy Tsikhiseli
From: Helen Brook
Date: May 30, 2006
Re: Miscellaneous

As per your request, please be advised that on May 30th, 2006, I worked in the office from 2:20 p.m. till 9:15 p.m. I arrived at 2:20 p.m. because of incidental sickness. The details thereof are confidential. Please note that on Tuesdays I finish work at 9:15 p.m. and on Wednesdays start at 10:00 a.m. - this is a broken shift.

Furthermore as the result of this rigorous work schedule and continuous typing for many hours on a daily basis I have developed a condition in the wrist that needs treatment and **may require reasonable adjustments**. I would appreciate your cooperation in this matter.

Should you have any questions concerning the above, I would be happy to address them.

(Original Notice of Motion, Exhibit B, emphasis added). The doctor's note, written on a prescription form from Dr. Yuri Patin reads "Brook, H. Off duty, 06.07 - 07.14.06" (remainder

illegible) (id. Exhibit C).

According to plaintiff's complaint, Mr. Tsikhiseli responded to plaintiff's request by telling her to "do her job or leave" (Complaint at ¶10), at which time plaintiff immediately filed a claim with the Workers' Compensation Board (id. ¶12). Plaintiff claims that immediately following the Workers' Compensation Board Claim, Mr. Tsikhiseli began harassing and mistreating her at work (id. 13), and soon told plaintiff that she was "free to go if she did not want to be loyal to Overseas Media" (Complaint ¶ 15).

Defendant was fined by the Workers' Compensation Board in September of 2006 for failing to provide necessary documents pertaining to plaintiff's pending Workers' Compensation case. Less than two months later, plaintiff was terminated from defendant's employ.

In January of 2008 this court considered the original motion to dismiss plaintiff's complaint. By decision dated March 7, 2008, this court dismissed plaintiff's first and third causes of action. The instant motions to renew and reargue followed.

Discussion

As with any motion to reargue, success is predicated upon a demonstration that in arriving at its earlier decision, the court either overlooked or misapprehended the facts or the law or, somehow mistakenly arrived at its conclusion (CPLR 2221(d)(2); Foley v. Roche, 68 AD2d 558, 567 [1st Dept. 1979]; Schneider v

Solowey, 141 AD2d 813 [2nd Dept 1988]; Pahl Equipment Corp. v. Kassis, 182 AD2d 22, 27 [1st Dept 1992]). By contrast, a motion to renew is limited to new or additional facts which could not have been presented to the court on the original motion. The caveat, however, is that the party seeking renewal must demonstrate that the evidence either did not exist or was unknown (see, Mangine v. Keller, 182 AD2d 476 [1st Dept 1992]) and must also present a justifiable excuse for not bringing the evidence to the court's attention on the original motion (CPLR 2221(e)(2)(3); Martin v. Triborough Bridge and Tunnel Authority, 180 AD2d 596 [1st Dept 1992]).

Addressing the motions in reverse order, plaintiff's cross-motion is considered first. Plaintiff claims that renewal of her first cause of action is warranted because her prior counsel submitted the wrong doctor's notes in opposition to the original motion to dismiss (Cross-Motion, Exhibits B and C). Plaintiff's new counsel further argues that the two new notes, which are claimed to have been submitted to plaintiff's employer, demonstrate that she requested reasonable accommodation.

By far, the biggest problem that this court has with this purported new evidence, is that the plaintiff herself does not state that she actually gave defendant these letters, and does not explain why they were not presented earlier. Plaintiff's only explanation is:

I asked Carrie why they submitted a medical note from Dr. Patin which dealt with my flu and headache illness for which I took a few days off in July 2006 (Dr. Patin's note has nothing to do with Carpal Tunnel Syndrome). I did not receive a satisfactory response.
(Affidavit of Helen Brook, Cross-Motion, Exhibit E).

This statement, on its own, is simply not sufficient to justify the late introduction of the two doctor's notes (CPLR 2221(e)(2)(3); Martin v. Triborough Bridge and Tunnel Authority, 180 AD2d 596 [1st Dept 1992]). Moreover, neither the affirmation of new counsel nor plaintiff's original complaint is helpful to plaintiff's argument. Plaintiff's new counsel is not a fact witness. Plaintiff's original complaint, mentions nothing about a June 28, 2006 doctor's note (Cross-Motion, Exhibit B) or a August 2, 2006 doctor's note (id. Exhibit C), and in fact, only references events that occurred in May of 2006 and culminated in the filing of the Workers' Compensation case (Complaint ¶¶ 9, 10, 12). Inasmuch as plaintiff has failed to present a justifiable excuse for not bringing the evidence to this court's attention on the initial motion, the motion to reargue the portion of this court's March 2008 decision dismissing plaintiff's first cause of action is denied.

The balance of plaintiff's motion seeking reargument of the portion of this court's decision dismissing plaintiff's third cause of action is also denied. Plaintiff's third cause of action as set forth in her complaint, in pertinent part, reads as

follows:

Third Cause of Action

(Discrimination and Retaliation Under the Workers
Compensation Law §120)

31. Pursuant to §120 of the Worker's Compensation Law, it is unlawful for an employer or his or her duly authorized agent to discharge or in any other manner discriminate against an employee as to his or her employment because such employee has claimed or attempted to claim compensation from such employer.

32. As set forth in the preceding paragraphs, Defendant discriminated and retaliated against plaintiff after she filed her Workers' Compensation claim.

33. Defendants' actions constitute discrimination and retaliation against Plaintiff in violation of the Workers' Compensation Law, §120.

(Complaint).

Contrary to the arguments advanced by plaintiff's new counsel, the retaliation claim, as presented, is not a general retaliation claim. It is a retaliation claim predicated on discrimination under the Workers' Compensation Law. As noted in this court's earlier decision, the remedy for a claim of violation under the Workers' Compensation Law is to file a complaint with the Worker's Compensation Board (see, Rice v. University of Rochester Medical Center, 46 AD3d 1421 [4th Dept 2007]; Burlew v. American Mutual Insurance Co., 63 NY2d 412 [1984]). As such, there is no need for this court to reconsider its prior decision in this regard.

There is also no reason for this court to reconsider its decision to allow plaintiff's second cause of action to proceed. In March of 2008, the court dismissed plaintiff's first cause of action because plaintiff had not adequately demonstrated that she had requested a reasonable accommodation from her employer. However, the fact that plaintiff was terminated from her position shortly after filing a Workers' Compensation case, which in itself is a protected activity under the statute (see, New York Executive Law §297(1)(e)¹, 3(a) and (b); NYCRR §8-107(7))², was enough for this court to decline the immediate dismissal of

¹ "1.(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article" (McKinney's Executive Law § 296).

² "7. Retaliation. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter, (iv) assisted the commission or the corporation counsel in an investigation commenced pursuant to this title, or (v) provided any information to the commission pursuant to the terms of a conciliation agreement made pursuant to section 8-115 of this chapter. The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, housing or a public accommodation or in a materially adverse change in the terms and conditions of employment, housing, or a public accommodation, provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity (NYCRR §8-107(7)).

plaintiff's second cause of action. Having considered the papers presented on the instant motion, this court declines to change its position on this issue.

Accordingly, it is

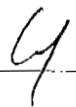
ORDERED that the motion and cross-motion advanced by defendant and plaintiff, respectively, are denied.

Counsel for the parties are directed to appear for a Preliminary Conference in IA Part 15, Room 335, 60 Centre Street, New York, New York on March 13, 2009 at 11:00 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/2/09

FILED
MAR 2 2009
CLERK OF COURT



HON. WALTER B. TOLUB, J.S.C.