

Matter of Thomas v Mastercard Advisors, LLC

2009 NY Slip Op 30591(U)

March 19, 2009

Supreme Court, New York County

Docket Number: 101223/09

Judge: Walter B. Tolub

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

PRESENT: Walter B. Tolub
Justice

PART 15

James Thomas

INDEX NO. 101223/09

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Re: _____

The following papers, numbered 1 to _____ were read on this 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 ACCOMPANYING MEMORANDUM DECISION

FILED
MAR 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/19/09

Walter B. Tolub
WALTER B. TOLUB

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 15

-----x
In the Matter of the Application of
JAMES THOMAS

Petitioner,

Index No. 101223/09
Mtn Seq. 001

For an order to conduct pre-action
disclosure of files, records and
documents maintained in the possession
and control of

MASTERCARD ADVISORS, LLC, and
MASTERCARD INTERNATIONAL
INCORPORATED,

Respondents.

FILED
MAR 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----x
WALTER B. TOLUB, J.:

This is Petitioner's application for an order directing the Respondents to produce records and documents relating to his employment pursuant to CPLR 3102[c]. Petitioner claims that said documents are necessary to properly frame a complaint and plead a cause of action. Respondents' oppose Petitioner's motion and cross-move for a protective order.

Facts

Petitioner was hired by MasterCard Advisors on February 26, 2003 as the Vice President of Strategic Development and Implementation. Mr. Thomas was terminated from his employment on August 28, 2007. He claims that, at the time he was terminated, his employer stated that he was being terminated "for cause" based upon claims of unprofessional conduct. Plaintiff claims

that MasterCard Advisors (Advisors) failed to follow the standards and procedures (Standards) adopted by MasterCard and contained in employee handouts. Petitioner claims he relied upon the Standards as part of the terms of his employment.

Plaintiff believes that he has a cause of action against Advisors for termination in violation of the Standards. Although Petitioner was supplied with his personnel file, he now seeks all records and documents relating to his termination. Petitioner seeks pre-action discovery so that he may frame his complaint and state proper causes of action.

Petitioner also claims that he was involved in a delicate process relating to a global information initiative. Petitioner claims that he and Respondents differed in positions on how the initiative should be conducted and that he may have a claim under Labor Law §740, New York's Whistleblower Protection Act. Mr. Thomas argues that he needs access to the communications relating to his termination so that he may draft a complaint with cause of action for this violation.

Lastly, Mr. Thomas is an openly gay man. He claims that he may also have a cause of action for discrimination.

Respondents oppose Petitioner's motion arguing that he was an "at will" employee and did not have to be terminated for cause. Respondents claim that Petitioner has not satisfied his burden for pre-action discovery pursuant to CPLR §3102.

Respondents cross-move for a protective order in the event that this court grants Petitioner's motions (CPLR 3103[a]).

Discussion

CPLR §3102[c] provides that a plaintiff may petition the court to obtain discovery before service of a complaint (CPLR 3102[c]; Holzman v. Manhattan and Bronx Surface Transit Operating Authority, 271 AD2d 346 [1st Dept 2000]). Pre-action discovery may be appropriate to preserve evidence or to identify potential defendants, however, it cannot be used by a prospective plaintiff to ascertain whether he has a cause of action (Holzman v. Manhattan and Bronx Surface Transit Operating Authority, 271 AD2d 346 [1st Dept 2000] citing Stump v. 209 E. 56th St. Corp., 212 AD2d 410). A petition for pre-action discovery should be granted when the petitioner demonstrates that he has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong (Holzman v. Manhattan and Bronx Surface Transit Operating Authority, 271 AD2d 346 [1st Dept 2000] citing Bliss v. Jaffin, 176 AD2d 106).

Here, the Petitioner claims that he may have three causes of action against the Respondents: (1) Wrongful termination in violation of Respondents' Standards; (2) Violation of Labor Law §740 [Whistleblower Protection Act]; and (3) Discrimination.

Petitioner claims that he was terminated for cause and that he never had a chance to respond to any charges that may have

been made against him. Additionally, Petitioner claims that Respondents violate their own internal procedures with respect to his termination.

Respondents provided Petitioner with his personnel file. Contained in the file was Petitioner's Application for Employment dated February 3, 2003. Petitioner certified on the last page of the application that "I understand that my employment may be terminated with or without cause and with or without notice, at any time, at the option of either MasterCard or myself." (Petitioner's Ex. B). It follows that Petitioner was an at-will employee.

Petitioner argues that New York recognizes an action for breach of contract when plaintiff can show that the employer made the employee aware of an express written policy limiting the right of discharge and that the employee detrimentally relied on the policy when accepting employment (Weiner v. McGraw-Hill, Inc., 57 NY2d 458 [1982]). Petitioner claims that he relied on Respondents Standards which limit when an employee maybe discharged.

Central to the argument in Weiner v. McGraw-Hill, Inc., 57 NY2d 458 [1982], was a written proviso in the employee manual which stated that employees would not be terminated without just and sufficient cause. In contrast to the Weiner v. McGraw-Hill, case, here, the Standards had an explicit disclaimer of a

contractual relationship. Similar to the Lobosco v. New York Telephone Company, 96 NY2d 312 [2001] case, Respondents 2007 Code of Conduct states that "[a]biding by the standards and procedures outlined in the Code and Community's related policies is a condition of continued employment with the Company. However, this Code is not a contract of employment and is not intended to create any express or implied promises or guarantees of fixed terms of employment." (Ex. B to Supplemental Aff. Of Ms. Pirone). As such, Respondents have made it clear through its Standards, on which Petitioner claims reliance, that it may terminate employment at will. Petitioner cannot reasonably interpose an express or implied contractual obligation on Respondents. An employee seeking to rely on a provision arguably creating a promise must also be held to reliance on the disclaimer (Lobosco v. New York Telephone Company, 96 NY2d 312 [2001]). Petitioner's application for pre-action discovery relating to wrongful termination is therefore denied.

As for Petitioner's request for pre-action discovery relating to his claim for violations of labor Law §740, that application is also denied. Labor Law §740 contains a one year statute of limitations. As such, claims under this statute relating to his termination of employment on August 28, 2007, are now time barred.

Lastly, Petitioner's claim that he may have been terminated

because he is an openly gay man. Without more, such a bare statement is insufficient to obtain pre-action discovery (CPLR 3102[c]).


Accordingly, it is

ORDERED that the Petition is denied in all respects; and it is further

ORDERED that Respondents' cross-motion for a Protective Order is denied as moot.

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

Dated: 3/19/09



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

FILED
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COUNTY CLERK'S OFFICE
NEW YORK