

Morris v Sports Club/LA.

2009 NY Slip Op 30813(U)

April 8, 2009

Supreme Court, New York County

Docket Number: 102612/2007

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Brad Morris

INDEX NO. 102612/07

MOTION DATE _____

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

- v -
The Sports Club/HA

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 _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

PAID
PAPERS NUMBERED
FILED
APR 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: 4/7/09

Ley
LOUIS B. YORK
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 2**

-----X

BRAD MORRIS,

Plaintiff,

Index No. 102612/2007

-against-

THE SPORTS CLUB/LA.

Defendant.

LOUIS B. YORK, J.:

FILED
APR 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

Background

Plaintiff was employed as a fitness trainer with the Sports Club LA from January, 2005 until his termination on November 15, 2006. Plaintiff alleges that he was fired for discriminatory reasons. Defendant claims that Plaintiff was terminated because the assistant general manager, Brian Fahey, witnessed Plaintiff threatening a non member. According to Defendant, this incident occurred a few days after Plaintiff had sexually harassed a fellow employee.

On the day following his termination, Plaintiff states that he had a telephone conversation with Defendant's general manager, Tonya Jacobs. According to Plaintiff, he told Ms. Jacobs that as the father of two daughters, he had too much respect for women to ever commit sexual harassment. Ms. Jacobs allegedly responded, "C'mon Brad, you're still a man." Plaintiff's Aff. at 12. Plaintiff claims that this statement shows that Defendant presumes allegations of sexual

harassment made against men to be true. Plaintiff argues that Defendant failed to investigate the allegations of sexual harassment because Plaintiff is a man. Ms. Jacobs admits that she spoke to Plaintiff but does not recall making the alleged statement. Defendant states that even if Ms. Jacobs made the statement, there is no bias. Instead, it found that there was no need to investigate the allegation of sexual harassment because Mr. Fahey observed Plaintiff threaten a prospective member and fired him on that basis.

Plaintiff filed a complaint with the New York State Division of Human Rights, (DHR), alleging employment discrimination based on sex, in violation of New York State Human Rights Law, 15 N.Y. Exec. Law § 296, and under Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e (2).

Plaintiff's DHR claim is not in the record. The Court has only the brief statement of the DHR issued with its Determination on April 26, 2006. The DHR found no examples of any employee receiving more favorable treatment than Plaintiff under similar circumstances. The DHR also found that the female employee, who was the alleged victim of Plaintiff's sexual harassment, and who allegedly received more favorable treatment than Plaintiff because the allegations of sexual harassment were not investigated, was not similarly situated because she had not been accused of a similar offense. In that the records did not support a nexus between Plaintiff's sex and the decision to terminate him, it ordered the case dismissed and the file closed.

Plaintiff appealed the DHR decision to the United States Equal Employment Opportunity Commission which issued a Dismissal and Notice of Rights in which it adopted the findings of the DHR and granted Plaintiff the right to sue.

On March 31, 2007, Plaintiff filed this complaint with this Court asserting causes of action for breach of contract, defamation and discrimination. Defendant moved to dismiss the

claims for discrimination and defamation under CPLR 3211(a)(7). The order dismissing the second and third causes of action on default noted that Title VII does not support a claim for discrimination and that Plaintiff had elected his remedy when he filed a complaint with the New York State Human Rights Division. Defendant subsequently moved to dismiss the final cause of action for breach of contract. This Court dismissed the final cause of action in a Judgment entered on March 21, 2008.

Now, Plaintiff moves by order to show cause to vacate and set aside the March 21 Judgment and to vacate and set aside the July 3 Order to the extent it dismissed his Title VII (Civil Rights Violation) cause of action pursuant to CPLR 5015(a)(1). Plaintiff also seeks to amend his complaint pursuant to CPLR 3025(b) to conform to new evidence. Defendant opposes the motion and cross moves for sanctions and costs based on the allegedly frivolous nature of this case.

Discussion

Under CPLR 5015(a), the Court may vacate an order granted on default if there is a reasonable excuse for the neglect and a meritorious cause of action. 114 W. 26th St. Assoc., L.P. v. Fortunak, 22 A.D.3d 346, 346, 801 N.Y.S.2d 89, 89 (1st Dept. 2005). New York Courts have recognized law office failure as excusable neglect. ICBC Broad. Holdings-NY, Inc. v. Prime Time Adver., Inc., 26 A.D.3d 239, 240, 810 N.Y.S.2d 40, 42 (1st Dept. 2006).

Plaintiff contends that there is a reasonable excuse for the default because depression, attention deficit disorder (ADD), and an office move and renovation rendered his lawyer, Dwane Smith, unable to meet his professional obligations. Plaintiff submits affidavits from Mr. Smith and Smith's primary care physician, Dr. Richard Goldberg, describing how Mr. Smith was depressed and unable to afford his medication from January, 2007 until February, 2008. The

Goldberg affidavit explains that Smith was unable to concentrate when life stressors exacerbated Smith's depression and ADD. Mr. Smith submits that he became incapacitated by the combined stressors of a divorce, a bed bug infestation and the relocation and remodeling of his office. He was unable to access his office during April and May, 2007. Subsequently, in June, July and August of 2007, Mr. Smith became preoccupied with subletting his office space. These factors combined to cause him to default on the June motion to dismiss. Then, in October, November and December of 2007, he states that he was once again preoccupied with subletting his office space and trying to arrange for a loan. He describes a difficult year financially in which he was unable to function due to his inability to afford his medication. In February, 2008, Mr. Smith again relocated his office. This new office required renovations, and Mr. Smith was once again unable to attend to his law business.

Defendant contends that Mr. Smith was only intermittently disabled during the period of time at issue and was in fact able to attend to many matters pertaining to this case as well as his other cases. Defendant lists an August 15, 2007 preliminary conference; a trial on October 15, 2007; a December 5, 2007 conference call with the law secretary; an in person court scheduled conference on December 12, 2007; and January 3, 2008 depositions.

Mr. Douglass provides a list of activities in which Mr. Smith was unable to participate during the period of time at issue, including the motion to dismiss in June of 2007. He states that Mr. Smith would not set dates for depositions and did not comply with directives from this court regarding discovery. Then, when contacted by Defendant about adjourning the return date for the summary judgment motion, Smith failed to execute a stipulation to adjourn and failed to serve opposing papers.

Defendant states that Plaintiff should not be allowed to reopen this case because it will

prejudice Defendant. Defendant argues, without any specifics, that people have departed and memories have faded in the three years since this case was initiated. Defendant cites legal bills in excess of \$20,000. Defendant also claims that Plaintiff demonstrated willful neglect in failing to take action until April, 2008. Plaintiff asserts he first became aware of the default in June of 2007.

Although, as Defendant states, Plaintiff could have been more diligent, Plaintiff's motion to vacate is timely, within one year after service of a copy of the Order or Judgment. CPLR 5015(a)(1). The time at issue in this case is not three years, as Defendant contends, but rather the time between the Judgment and the motion to vacate. Moreover, Plaintiff asserts that he relied on assurances from Mr. Smith that he would move to vacate the Judgment. Because Plaintiff did not willfully ignore a court order or summons, Plaintiff is not guilty of willful neglect. See Udall v. Alcama Supply and Contracting Corp., 275 A.D. 2d 453, 454, 713 N.Y.S. 2d 77, 78 (2nd Dept. 2000).

An affidavit from the treating physician, Dr. Goldberg, is sufficient to establish that Mr. Smith had problems concentrating and was incapacitated for the period of time at issue. See Embraer Fin. Ltd. v. Serv. Aereos Prof., S.A., 42 A.D. 3d 380, 381, 839 N.Y.S. 2d 756, 756 (1st Dept. 2007). Plaintiff has satisfied the excusable default prong of his motion.

However, Plaintiff's reliance on Carey v Mt. Desert Island Hosp., 156 F. 3d 31 (1st Cir. 1998) is misplaced. The plaintiff in Carey established that he worked in a hostile environment and made a claim for sexual harassment after the company issued a mission statement barring the employment of men. Carey, 156 F.3d at 36. He was terminated and replaced by a woman. Moreover, three women who were similarly situated and accused of similar misconduct were not terminated. Carey, 156 F.3d at 38.

To demonstrate a prima facie case of gender discrimination, a plaintiff must show that he is a member of a protected class, that he is qualified for his job, that he was terminated, and that discrimination can be inferred from the circumstances surrounding his termination. Ferrante v. American Lung Ass'n, 90 N.Y.2d 623, 629 (1997); accord Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 63 (2nd Cir. 1997). If a plaintiff can show that a woman who was similarly situated received preferential treatment, discrimination can be inferred from the circumstances. See id. at 63.

Here, Plaintiff cites no incidents of a woman receiving more favorable treatment than a man, or that he was replaced by a woman after he was terminated. Furthermore, Plaintiff's interpretation of the meaning of Ms. Jacobs's statement is not self evident, and it is legally insufficient to support a claim for discrimination based on gender. Moreover, Plaintiff argues that Defendant did not terminate another male accused of sexual harassment.

Plaintiff has failed to meet his burden of establishing a meritorious cause of action. Even if the Court accepts Plaintiff's allegations as factual, they do not make out a Title VII claim for discrimination based on gender. Plaintiff does not present any facts or circumstances from which the Court can infer discrimination. See id. at 63. Therefore, the Court denies Plaintiff's motion to vacate the default Order and Judgment.

Plaintiff also requests leave to amend his complaint under CPLR 3025(b) to conform to new evidence and to more clearly make out a claim under Title VII. The amended complaint strikes the allegation of discrimination based on Plaintiff's heterosexuality. The amended complaint also accuses Defendant of creating a pretext for Plaintiff's termination. The alleged pretext is the incident between Plaintiff and the prospective member. Plaintiff states that newly discovered evidence establishes that Defendant's claim of Plaintiff threatening a prospective

member is a pretext. According to Plaintiff, the new evidence, in a deposition given by Ms. Jacobs in January 2008, demonstrates that the real reason for Plaintiff's termination was sexual harassment and not for threatening a prospective member. Plaintiff annexes a copy of the deposition. Plaintiff argues that Jacobs' deposition contradicts Defendant's response to the DHR complaint in which Defendant stated that Ms. Jacobs was merely trying to calm Plaintiff down, and that Ms. Jacobs did not say or imply that Defendant was biased against men. In her deposition, Ms. Jacobs states that she remembers the conversation with Plaintiff to have been about Plaintiff's threat of a prospective member. Ms. Jacobs confirms Defendant's position that there was no need to investigate after Plaintiff was observed threatening a prospective member.

As Defendant argues, leave to amend should be denied because the alleged facts do not establish a cause of action. See Rappaport v. VV Publ'g Corp., 223 A.D.2d 515, 516, 637 N.Y.S.2d 109, 110 (1st Dept. 1996). Plaintiff's amendment fails to establish a claim for sexual discrimination for all the reasons given above. The amendment does not allege any new facts to support a claim of discrimination. The pretext issue is irrelevant because Plaintiff must first make out a prima facie case of discrimination before he responds to any defense asserted by Defendant. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Moreover, Ms. Jacobs's deposition does not include new evidence; it merely reiterates the position of Defendant that Plaintiff was terminated after he was observed threatening a prospective member. Therefore, Plaintiff's request to amend his complaint is denied.

Defendant cross moves for sanctions and costs based on the allegedly frivolous nature of this case pursuant to 22 NYCRR § 130-1.1. Defendant argues that Plaintiff's claims for discrimination, defamation and breach of contract are frivolous. Plaintiff replies that his cause of action is meritorious, and that he merely wants to have his day in court.

Under 22 NYCRR § 130-1.1(c)(3), frivolous conduct is conduct that, "was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party." This Court has wide discretion on the issue of sanctions. See Levy v. Carol Mgmt. Corp., 260 A.D.2d 27, 33, 698 N.Y.S.2d 226, 231 (1st Dept. 1999). When a plaintiff acts with intent to delay or harass, then sanctions may be appropriate. But if, as in this case, Plaintiff acts in good faith and merely fails to prove his case, then sanctions are inappropriate. See Yenom Corp. v. 155 Wooster St., Inc., 33 A.D.3d 67, 69, 818 N.Y.S.2d 210, 212 (1st Dept. 2006). Here, although Plaintiff persists in a meritless claim, his conduct is not so egregious as to be worthy of sanctions. Therefore, this Court exercises its discretion and denies Defendant's cross motion for sanctions.

Conclusion

Based on the above, therefore, it is

ORDERED that Plaintiff's motion to vacate the default judgment is denied;

and it is further

ORDERED that the prong of Plaintiff's motion to amend the complaint is denied

and it is further

ORDERED that Defendant's cross motion for sanctions and costs is denied.

Dated: ^{April}~~March~~ 8, 2009

FILED
 APR 14 2009
 COUNTY CLERK'S OFFICE
 NEW YORK
 ENTER

 LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.