

Brook v Overseas Media, Inc.

2009 NY Slip Op 32345(U)

October 8, 2009

Supreme Court, New York County

Docket Number: 107493/2007

Judge: Walter B. Tolub

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

PRESENT: **WALTER B. TOLUB**

PART 15

Index Number : 107439/2007
BROOK, HELEN
vs.
OVERSEAS MEDIA
SEQUENCE NUMBER : 005
AMEND

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
OCT 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/8/09

W
WALTER B. TOLUB 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 15

-----x
HELEN BROOK

Plaintiff,

Index No. 107493/2007
Mtn. Seq. 005

-against-

OVERSEAS MEDIA, INC.,

Defendant.

FILED
OCT 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

WALTER B. TOLUB, J.:

This is Plaintiff's motion for leave to amend the Complaint or, in the alternative, leave to commence a new action upon the same transaction (CPLR §§ 3025[b], 205[a] respectively).

Facts

As stated in this Court's prior decisions, Plaintiff began working for Defendant, a Russian television network, in June of 2004. Plaintiff was promoted twice in 2005 and began to write and produce two of Defendant's television shows.

According to Plaintiff's Complaint, in the Spring of 2006, she was diagnosed with carpal tunnel syndrome and was instructed by her doctor to take short breaks and limit her typing. Plaintiff further claims that she advised her boss of her condition on May 30, 2006 by sending him a memorandum and a doctor's note. The doctor's note was written on a prescription form from Dr. Yuri Patin and reads, in part, "Brook, H. Off duty,

6.07-7.14.06."

According to Plaintiff's Complaint, her boss responded to her request by telling her to "do your job or leave", at which time Plaintiff immediately filed a claim with the Worker's Compensation Board. Plaintiff claims that immediately following the Worker's Compensation Board Claim, her boss began harassing and mistreating her at work and told Plaintiff that she was "free to go if she did not want to be loyal to Overseas Media".

Plaintiff then commenced this action for (1) Disability discrimination pursuant to New York City Human Rights Law; (2) Retaliation under the New York City Human Rights Law; and (3) Discrimination and Retaliation under the Workers Compensation Law.

In January of 2008, this Court considered Defendant's original motion to dismiss Plaintiff's Complaint. By decision dated March 7, 2008, this Court dismissed Plaintiff's first and third causes of action because the doctor's note submitted did not accurately describe Plaintiff's limitations and in what manner Plaintiff could be accommodated.

Plaintiff then filed a motion to renew. Plaintiff argued that her prior counsel did not submit two doctor's notes (both dated after the initial doctor note and prior to the Worker's Compensation Claim). Plaintiff claims that these two notes describe a reasonable accommodation for Plaintiff's carpal tunnel

[* 4]

syndrome. In its February 2009 decision, this Court noted that these two letters were never referenced in the Complaint and were not supported by an affidavit of a fact witness. Additionally, this court noted that Plaintiff did not present a justifiable excuse for why she failed to present the evidence on the initial motion. As such, this Court denied Plaintiff's motion.

By this motion, Plaintiff seeks leave to amend the Complaint to reference the two doctor's notes. Alternatively, Plaintiff seeks leave to commence a new action based on the same transactions and occurrences.

Discussion

Although leave to amend a pleading should be freely granted (CPLR 3025 [b]), the motion must be supported by an affidavit of merit and evidentiary proof that could be considered upon a motion for summary judgment (Nab-Tern Constructors v. City of New York, 123 AD2d 571 [1st Dept 1986]).

Here, Plaintiff's motion is not supported by evidentiary proof, other than an affirmation of counsel, who is not a fact witness. Additionally, as stated in this Court's February 2009 decision, Plaintiff does not state that she actually gave the Defendant these letters and does not explain why they were not presented earlier.

Courts are reluctant to allow amendments to pleadings based

on facts which were known prior to the commencement of the action Surlak v. Surlak, 95 Ad2d 371 [2nd Dept 1983]). Moreover, a party will not be permitted to serve an amended pleading containing facts of which he had full knowledge when the original pleading was filed where no satisfactory explanation for the omission has been shown (Kamen v. State, 34 Misc.2d 380 [Court of Claims 1962]).

Plaintiff seeks leave to amend her Complaint two years after the commencement of this action, without including any facts which were unknown at the time of the initial Complaint, without offering any explanation for not presenting the letters earlier, and without addressing this Court's noted issues outlined in its prior decisions.

Under these circumstances, Plaintiff's motion to Amend is denied.

As for that branch of Plaintiff's motion for leave to recommence a new action pursuant to CPLR §205[a], that motion is also denied. CPLR §205[a] applies to cases which have already been terminated. This action is still active, albeit, for only one of the three initial causes of action.


Accordingly, it is

ORDERED that Plaintiff's motion is denied in its entirety.

Counsel for the parties are directed to appear as scheduled on October 30, 2009 at 11:00 AM in room 335 for a status conference.

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

Dated: 10/8/09



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

FILED
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COUNTY CLERK'S OFFICE
NEW YORK