

Uwechia v City of New York

2009 NY Slip Op 32691(U)

November 6, 2009

Supreme Court, New York County

Docket Number: 106289/08

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER
Justice

PART 5

Index Number : 106289/2008
UWECHIA, CHUKWUMA K.
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
STRIKE

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

this motion to/for _____

PAPERS NUMBERED
1
2
3

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

FILED
NOV 13 2009
NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 11/9/09

[Signature]
HON. EILEEN A RAKOWER 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: PART 5

-----X
CHUKWUMA K. UWECHIA,

Plaintiff,

Index No.
106289/08

DECISION
and ORDER

-against-

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF JUVENILE JUSTICE, NEIL
HERNANDEZ, JUDITH PINCUS, CARLOS A.
SERRANO, and JACQUELINE JAMES,

Defendants.

FILED
Mot. Seq. 62
NOV 13 2009
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. EILEEN A. RAKOWER:

Plaintiff Chukwuma K. Uwechia ("Plaintiff") brings this action pursuant to the New York City Human Rights Law and New York Human Rights Law §296 to recover for alleged civil rights violations suffered by Plaintiff in the workplace. Plaintiff is a black male of Nigerian origin who suffers from a hearing impairment. Since October 4, 1999, Plaintiff, an attorney duly licensed to practice law in the State of New York, has been employed by the New York City Department of Juvenile Justice ("DJJ") as a Contract Manager. From October 9, 1999 until November of 2007, Plaintiff was the sole staff member in the DJJ's Contract Unit, where Plaintiff was responsible for the procurement of all DJJ contracts in excess of \$100,000.

Plaintiff alleges that in 2002, following the resignation of Chief Contracting Officer Eric Zimiles (a white male not of Nigerian origin), the individual to whom Plaintiff reported, Defendants required Plaintiff to combine his usual responsibilities as a Contract Manager with those of the Chief Contracting Officer. Despite being tasked with additional responsibilities, however, Plaintiff not receive a salary increase commensurate with his additional duties. Although an individual by the name of Harry Bavaro (also a white male not of Nigerian origin) was appointed to the position of Chief Contracting Officer in July of 2002, Plaintiff alleges that he continued to handle the responsibilities of Chief Contracting Officer

without being compensated accordingly, and that this situation persisted following Bavaro's resignation in 2006. Plaintiff states that he has made repeated complaints to Defendants about being burdened with the responsibilities of both positions without being compensated accordingly, and that these complaints were repeatedly ignored. Plaintiff also alleges that Defendants refused to provide Plaintiff with secretarial or support staff.

Plaintiff alleges that, in or around March of 2007, DJJ announced a vacancy for the position of Agency Chief Contracting Officer. In addition to being a higher position than Plaintiff's current position as a Contract Manager, the position had a substantially larger salary. As noted above, Plaintiff alleges that, not only was he qualified for the position, he actually had been discharging the duties of Agency Chief Contracting Officer since 2002 without official recognition or appropriate compensation. Plaintiff applied for the position in or around April 2007, and was interviewed by Defendants Pincus and Serrano the following month. However, despite being qualified for the position, and despite having actually discharged the attendant duties of the position since 2002, Defendants failed to offer the job to Plaintiff. Instead, Defendants offered the position to Margaret Tullai, a white female not of Nigerian origin who, according to Plaintiff, was not qualified for the position.

On or about November 30, 2007 Defendants promoted Michael Joseph, a black male born in the United States, to the position of Deputy Agency Chief Contracting Officer, which has a higher salary than Plaintiff's current salary. Plaintiff alleges that Joseph did not possess the qualifications and experience for the job. According to Plaintiff, this position did not exist prior to November 30, 2007. Further, Plaintiff alleges that the position was never advertised prior to being filled by Defendants, in violation of DJJ and City protocols. Plaintiff claims that had the position been properly advertised, he would have applied for it.

Plaintiff commenced the instant action on May 5, 2008, alleging that Defendants' failure to hire him for the Agency Chief Contracting Officer, promote him to the Deputy Agency Chief Contracting Officer, and/or increase his salary commensurate with his added responsibilities was the product of unlawful discrimination toward Plaintiff based upon his being of Nigerian origin. Plaintiff also alleges that the foregoing was in retaliation for his bringing a federal lawsuit in 2002 against DJJ and others alleging racial discrimination (the action was settled in 2004).

Presently before the court is Plaintiff's motion to strike the Defendants' answer pursuant to CPLR §3126 for their alleged repeated failure to fully respond to Plaintiff's discovery demands and comply with so-ordered stipulations entered into by the parties.

On October 16, 2008, the parties appeared for a preliminary conference and entered into a preliminary conference order. The order specified that Defendants were to respond to Plaintiff's first set of interrogatories and first request for documents by November 21, 2008. It further set forth that depositions of all parties were to be completed by December 23, 2008. Plaintiff received Defendants' response to Plaintiff's first request for documents on December 17, 2008. Plaintiff alleges that this response, in addition to being untimely, was "wholly inadequate, significantly deficient and non-responsive in several material respects." In addition, Defendants provided no response whatsoever to Plaintiff's first set of interrogatories.

On January 21, 2009, Plaintiff's counsel wrote a letter to Defendants' counsel requesting that Defendants furnish a more complete response to Plaintiff's first document request and respond to Plaintiff's first set of interrogatories. Plaintiff alleges that Defendants did not respond to the letter.

On February 17, 2009, the parties appeared for a compliance conference, wherein they entered into a so-ordered stipulation which provided as follows:

1. Defendants to respond to Plaintiff's first set of interrogatories within 30 days;
2. Defendants to supplement their response to Plaintiff's first request for documents within 30 days and respond to Plaintiff's letter dated January 21, 2009;
3. Depositions of all parties to be concluded by April 30, 2009; and
4. Defendants to serve document demands upon Plaintiff within 21 days, with Plaintiff to respond within 30 days of receipt thereof.

On March 17, 2009, Plaintiff's counsel wrote a letter to counsel for Defendants requesting that Defendants comply with the stipulation, as Plaintiff had not obtained the items specified therein.

On April 21, 2009 Plaintiff filed a motion pursuant to CPLR §3126 for sanctions to be imposed against Defendants for their failure to comply with their discovery obligations, including the striking of Defendants' answer. However, pursuant to a so-ordered stipulation entered into by the parties on May 12, 2009, the parties agreed that Plaintiff would withdraw his motion without prejudice, and that, in pertinent part

1. Defendants were to respond to Plaintiff's first set of interrogatories within 30 days;
2. Defendants were to supplement their response to Plaintiff's first set of document demands within 30 days; and
3. Defendants were to respond to Plaintiff's January 27, 2009 letter within two weeks.

The stipulation further provided that failure to comply with these three provisions would be deemed wilful and contumacious.

On May 26, 2009, Defendants served a response to Plaintiff's January 27, 2009 letter regarding Defendants responses and objections to Plaintiff's first document request. On June 9, 2009, Defendants supplemented their response to Plaintiff's first set of document demands, and provided Plaintiff with their response to Plaintiff's first set of interrogatories. On June 17, 2009, Defendants produced additional documents to Plaintiff.

On June 23, 2009, the parties appeared for another compliance conference. There, it was stipulated, *inter alia*, that Plaintiff would serve letters upon Defendants identifying alleged deficiencies in Defendants' May 26, 2009 response letter, and in Defendants' responses to Plaintiff's first set of interrogatories. The stipulation also provided that depositions of the four named Defendants were to take place August 18-21, 2009, and that remaining depositions were to be completed by September 30, 2009.

Plaintiff now claims that Defendants have failed to comply with the so-ordered compliance conference stipulations entered into by the parties on May 12, 2009 and June 23, 2009. Specifically, Plaintiff asserts that Defendants

- a) have refused to provide Margaret Tullai's tasks and standards and performance evaluations at Human Resources

- Administration/Mayor's Office of Contract Services where she claimed to have worked as a Contract Review Analyst/Associate Staff Analyst from August 2000 to December 2001;
- b) have refused to provide copies of compensation summary sheets for all employees of DJJ assigned to DJJ's central office in the period from February 2004 to the present;
 - c) have failed to verify their response to Plaintiff's first set of interrogatories;
 - d) have refused to state all reasons why Plaintiff was not selected for the unadvertised position position of Deputy Agency Chief Contracting Officer for DJJ in 2007; and
 - e) have failed to identify all documents, minutes, and emails relating to their response.

Plaintiff submits an affirmation in support of his motion to strike. Annexed thereto as exhibits are copies of Plaintiff's complaint; Defendants' amended answer; Plaintiff's first set of interrogatories; Plaintiff's first document requests; Plaintiff's notice of deposition; the 10/16/08 preliminary conference order; Plaintiff's 1/21/09 letter; the 2/17/09 compliance conference stipulation; Plaintiff's 3/17/09 letter; a letter from Plaintiff dated 10/29/08 indicating Plaintiff's compliance with his discovery obligations; the 5/12/09 compliance conference stipulation; and the 6/23/09 compliance conference stipulation.

Defendants submit an affirmation in opposition, wherein Defendants contend that they have fully complied with their discovery obligations. Defendants state that on December 17, 2008, they served their responses and objections to Plaintiff's first document request, and produced over 500 pages of responsive documents. Defendants further state that, pursuant to the May 12, 2009 and June 23, 2009 compliance conference stipulations, they produced approximately 1,000 additional pages of responsive documents, as well as responses to Plaintiff's first set of interrogatories.

CPLR §3216 provides, in pertinent part:

If any party... refuses to obey an order for disclosure... the court may make such orders with regard to the failure or refusal as are just, among them:

- (1) an order that issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
- (3) an order striking out pleadings or parts thereof...

Pursuant to CPLR §3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. The sanction of striking a party's answer is warranted only when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407[1st Dept. 2006]). A court may strike a party's answer only when "a clear showing that the failure to comply is willful, contumacious or in bad faith" is made by the moving party. Repeated non-compliance with court orders gives rise to an inference of willful and contumacious conduct. (*Goldstein v. CIBC World Markets Corp.*, 30 A.D.3d 217 [1st Dept. 2006]). However, there is a "strong preference in our law that matters be decided on their merits" (*Rosen v. Corvalon*, 309 A.D.2d 723 [1st Dept. 2003]).

Here, while Defendants have been untimely in responding to a number of Plaintiff's discovery requests, the court cannot conclude based on the record before it that Defendants' delays were the product of willful or contumacious behavior. While Plaintiff claims that Defendants violated the May 12, 2009 and June 23, 2009 so-ordered compliance conference stipulations, Defendants provided responses and produced documents in compliance therewith. That Plaintiff asserts that some of Defendants' responses are insufficient does not constitute a valid basis for striking Defendants' answer. Rather, if anything, it forms the basis for a motion to compel pursuant to CPLR §3124.

While Plaintiff did not specifically move to compel the discovery at issue in his motion to strike, the court will address the alleged deficiencies of Defendants' responses as set forth in Plaintiff's affirmations. CPLR §3124 provides:

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order

under this article... the party seeking disclosure may move to compel compliance or a response.

As summarized by the First Department in *Anonymous v. High School for Environmental Studies*, the law governing disclosure in New York is well settled:

It is beyond cavil that New York has long favored open and far-reaching pretrial discovery.... There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.... The words 'material and necessary' as used in the statute are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial.

32 A.D.3d 353, 358 [1st Dept. 2006]) (citations and internal quotations omitted).

First, with respect to Margaret Tullai's tasks and standards and performance evaluations at Human Resources Administration/Mayor's Office of Contract Services, Defendants assert that no such records are in their custody. Moreover, Defendants provide the affidavit of Darrell Allen, a Records Officer/Custodian of Records with the Human Resources Administration ("HRA"). Allen states that he has reviewed Ms. Tullai's personnel file, and that no tasks and standards or performance evaluations were contained therein. Accordingly this request is moot.

As for compensation summary sheets for all DJJ employees assigned to DJJ's central office from February 2004 to the present, Plaintiff asserts that this information is necessary to establish that Defendants discriminated against Plaintiff and two other individuals of Nigerian origin by failing to either promote these individuals or give them raises, while almost all other employees have received at least one promotion or raise in salary. Defendants oppose this request, asserting that it is broad, overly burdensome, and improperly impinges on the privacy interests of DJJ employees who are not parties to the action. Plaintiff counters by stating that City employee salaries are a matter of public record, and annexes to his reply affirmation portions of the September 15, 2009 City Record, which publicizes changes in personnel salaries in New York City government agencies, showing affected employees' names and salaries. Plaintiff also annexes printouts

from the website SeeThroughNY, a private website which provides a database of the names and salaries of individuals employed in state and local government in the State of New York. These printouts purport to reflect the salaries of Defendants Hernandez and Pincus.

The court finds that production of this information is warranted. Plaintiff has demonstrated that the information sought is regularly published by the City itself, thus refuting Defendants' objections on privacy grounds. Further, Defendants' conclusory assertion this request is overly broad or unduly burdensome is insufficient.

As for Plaintiff's claim that Defendants have failed to verify their responses to Plaintiff's first set of interrogatories, Defendants have annexed a copy of their response which indicates that it was in fact verified. Accordingly, any request seeking further verification is denied.

Turning to Plaintiff's assertion that Defendants have refused to state all of the reasons why Plaintiff was not selected for the position of Deputy Agency Chief Contracting Officer for DJJ in 2007, Defendants responded that Defendants selected Michael Joseph for the position because it was their belief that he was most qualified for the position. In addition, Defendants refer Plaintiff to documents produced by Defendants in support of their answer (these documents are not in the record before the court).

The court finds that, even if it were to find this response insufficient, Plaintiff is free to inquire into the specific factors which led Defendants to conclude that Joseph was the most qualified candidate for the position through the deposition testimony of the Defendants, which have not yet taken place. Accordingly, this request is denied.

Wherefore, it is hereby

ORDERED that Plaintiff's motion to strike is denied; and it is further

ORDERED that Defendants shall produce compensation summary sheets for all DJJ employees assigned to DJJ's central office from February 2004 to the present within 90 days of receipt of a copy of this order with notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: November 6, 2009



EILEEN A. RAKOWER, J.S.C.

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