SCAN

SHORT FORM ORDER mod

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

JAMES TRAINA,

Plaintiff(s),

-against-

MOTION DATE: 10/28/09
INDEX No.:9709/07
MOTION SEQUENCE NO:1

CAL. NO.:

CRESCENT CONTRACTING CORP.,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-3
Answering Affidavits.....	4,5
Replying Affidavits.....	6-7a
Briefs:	

Upon the foregoing papers, it is ordered that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in favor of defendant dismissing all claims against it contained in plaintiff's complaint is granted in part, and denied in part, as set forth below.

Crescent is a plumbing and heating contractor that performs work on major construction projects. It is located in the Bronx, New York, and has approximately 50 employees. Plaintiff was hired as a Project Engineer/Manager, Estimator and Purchasing Agent by Crescent when he was 54 years old. His employment with Crescent was terminated on February 13, 2007, when he was 65 years old. According to Crescent the reason for the termination was plaintiff's poor attitude and poor work performance.

Plaintiff claims that he was treated differently from other

employees and his employment was terminated because of his age. Plaintiff alleges that he was promised an incentive bonus in the sum of $90,000 for the Hunts Point Phase I Project ("Phase I"), of which $20,750 remains unpaid. He further alleges that he was promised an incentive bonus in the sum of $250,000 for the Hunts Point Phase II Project ("Phase II"), of which $180,072.00 remains unpaid. Plaintiff states that he submitted statements to Crescent enumerating the monies due on the separate incentive bonuses, and that the statements were accepted without objection.

Plaintiff commenced this action in mid-2007, alleging five causes of action: employment discrimination on the basis of age, the breach of an agreement to pay the balance of a bonus in the amount of $20,750, an account stated for $20,750, the breach of an agreement to pay balance of a bonus in the amount of $180,072, and an account stated for $180,072. Crescent denied the allegations of the complaint, alleged six affirmative defenses, and further alleged a counterclaim for tortious interference with business relations.

On this motion Crescent seeks summary judgment dismissing all of the plaintiff's claims in the complaint.

Summary judgment is the procedural equivalent of a trial [*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974)]. The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact [see *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Zuckerman v City of New York*, 49 NY2d 557 (1980)]. Once the movant makes its *prima facie* showing, the burden shirts to the opponent, who must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial [*Alvarez*, id; *Zuckerman*, id]. The evidence must be viewed in the light most favorable to the non-moving party [*Ruthinowski v Brinkman*, 63 AD3d 900, 902 (2nd Dept. 2009); *Pearson v Dix McBride, LLC*, 63 AD3d 895 (2nd Dept. 2009)].

To establish a prima facie case of age discrimination under the Human Rights Law (Executive Law §296) a plaintiff must demonstrate the following elements: (1) that he is a member of a

class protected by the statute; (2) that he was actively or constructively discharged; (3) that he was qualified to hold the position from which he was terminated; and (4) that the discharge occurred under circumstances giving rise to an inference of age discrimination [*Stephenson v Hotel Employees and Restaurant Employees Union Local 100 of the AFL-CIO*, 6 NY3d 265, 270 (2006) quoting *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 (1997); *Balsamo v Savin Corp.*, 61 AD3d 622 (2nd Dept. 2009)]. The protected class for age discrimination cases consists of individuals at least forty years of age [29 USC 631; *O'Connor v Consolidated Coin Caterers Corp.*, 517 US 308 (1996)]. Failure to establish every element of the cause of action entitles the employer to summary judgment dismissing the cause of action [*Johnson v NYU Hospitals Center*, 39 AD3d 817 (2nd Dept.), lv app den 9 NY3d 805 (2007); *Hemingway v Pelham Country Club*, 14 AD3d 536 (2nd Dept. 2005)].

Once the plaintiff makes a prima facie showing, the burden shifts to the defendant to rebut plaintiff's showing with a legitimate and nondiscriminatory reason for the discharge [*Stephenson*, supra at 270; *Ferrante*, supra at 629]. Thereafter, plaintiff must show that the reason given by defendant was merely a pretext for discrimination [*Stephenson*, supra at 271; *Ferrante*, supra at 630]. The issue in an action for age discrimination "is not whether the defendants acted with good cause, but whether their business decision would not have been made but for a discriminatory motive [*Stephenson v Hotel Employees and Restaurant Employees Union Local 100 of the AFL-CIO*, 14 AD3d 325, 329 (1st Dept. 2005) affd 6 NY3d 265 (2006); *Ioele v Alden Press, Inc.*, 145 AD2d 29, 35 (1st Dept. 1989)].

Here Crescent argues that plaintiff does not have a cause of action for age discrimination because he cannot show the fourth element. Plaintiff was hired when he was 54 years old by an individual who was over the age of 40. Plaintiff admitted that nobody at work made age-related comments, and nobody made jokes or disparaging remarks about his age. He also admitted that he never saw any other employee being treated poorly because of age. Plaintiff's salary of $126,000 was higher than other employees in similar positions, and he was provided the same benefits as everybody else.

Crescent states, without rebuttal, that Phase I was scheduled as a three-year job, has lasted longer than eight years, and as of the time of defendant's deposition in April, 2009, was still being completed. According to Crescent, Phase II was scheduled as a three-year job, has lasted longer than 5 years, and was ongoing at the time of defendant's deposition.

Plaintiff had difficulties working with the foreman at Phase II, and the foreman ultimately left the project. Plaintiff admitted having arguments with Yonkers Contracting, the general contractor on Phase II. Plaintiff caused "disharmony" and "greater harm to the company." According to defendant, Yonkers Contracting refused to work with plaintiff, and plaintiff was removed from the project in order for Crescent to maintain its relationship with Yonkers Contracting. Once plaintiff was removed from Phase II, he did not willingly participate in Phase I. Defendant also alleges that plaintiff had incorrectly estimated costs for Phase I and failed to hire the requisite minority-owned electrical contractor, thereby resulting in a loss to Crescent of $2,000,000.

Plaintiff was removed as project manager from both Phase I and Phase II in August, 2006. Barr Rickman, the son of the president, who turned 40 in 2007, became the project manager on both jobs. In late 2006 plaintiff was assigned to the Bronx Courthouse project, but he was unhappy and wanted to be taken off that job. He testified that he was "a mechanical guy" and didn't know "civil work." Crescent concluded that "there was no position in which plaintiff could effectively work because of his negative and argumentative attitude and self-imposed limitations." Defendant was terminated in February 2007.

According to the list of employees employed by Crescent on the day plaintiff's services were terminated, two office employees were older than he. Bob Osterhoudt, the employee who took over some of plaintiff's responsibilities was 51 years old. As of February 2007, 57% of Crescent employees were over the age of 40.

The sole alleged evidence of different treatment accorded to younger employees concerned seminars; according to plaintiff the younger employees were sent to seminars. Plaintiff testified that when he asked "why can't I go," the reason given was "well, you

have all of the knowledge."

On this record, plaintiff has utterly failed to make even a prima facie case of age discrimination. No direct or statistical evidence has been presented to show any circumstances giving rise to an inference of age discrimination in connection with plaintiff's discharge. Plaintiff's casual reference to seminars for younger employees does not suffice. In the absence of a prima facie case, summary judgment dismissing the age discrimination claim is appropriate [*Ferrante*, supra at 631].

Furthermore, even if the Court were persuaded that plaintiff has made out a prima facie case, defendant has presented a legitimate nondiscriminatory reason for plaintiff's discharge. Plaintiff has failed to raise a triable issue of fact that his discharge was pretextual and that age discrimination was the reason for the discharge [*Stephenson; Balsamo; Alvarado v Hotel Salisbury, Inc.*, 38 AD3d 398 (1st Dept. 2007); *Bockino v Metropolitan Transportation Authority*, 224 AD2d 471 (2nd Dept.), lv app den 88 NY2d 805 (1996)]. Based on the foregoing, defendant's request for summary judgment dismissing plaintiff's first cause of action for age discrimination must be granted.

Plaintiff's remaining causes of action concern alleged balances due on bonuses promised to plaintiff. These claims are for breach of oral contracts, not account stated. A cause of action alleging an account stated cannot be utilized simply as another means to attempt to collect under a disputed contract [*Ross v Sherman*, 57 AD3d 758 (2nd Dept. 2008); *Simplex Grinnell v Ultimate Realty LLC* , 38 AD3d 600 (2nd Dept. 2007); *Erdman Anthony & Associates, Inc. v Barkstrom*, 298 AD2d 981 (4th Dept. 2002)]. Accordingly, defendant is entitled to summary judgment dismissing the third and fifth causes of action.

The second and fourth seek damages based upon defendant's failure to pay the balances under the alleged incentive bonuses for the Phase I and Phase II projects. According to plaintiff, the incentive bonuses were to be paid as the job progressed, but were earned for "bringing the job in." The record contains a breakdown of how the incentive bonus would allegedly be paid for Phase I. In

addition, plaintiff allegedly compiled his own breakdown of amounts due. These exhibits provide amounts and dates and a job description, but no other words.

For Phase I, defendant testified that "the maximum of $90,000 would have been paid to Jim Traina upon the successful completion of the project, on the expediting the schedule and the buying out of the project." Defendant admitted that the parties had an agreement that amounts would be paid upon completion of the various items "as long as ... we would maintain a schedule, an expedited schedule ... and that the buy-outs would be as good or better than we estimated." Defendant did admit that portions of the incentive bonus for Phase I were paid to plaintiff even though the conditions for payment were not met.

Regarding Phase II, plaintiff has produced a writing executed by Reed Rickman, the president of Crescent. Under the column for Unit Price, are various amounts which add up to the total of $250,000, the amount of the alleged bonus for Phase II. Plaintiff also compiled his own breakdown of amounts due for Phase II. Plaintiff testified that the incentive bonus was earned "for getting the job for Crescent."

Defendant has produced a handwritten document regarding Phase II Cost to Complete. A notation at the bottom of the document provides: "reminded Jim that a commission/bonus is dependent on job doing well!!" Defendant testified that the bonus for Phase II was payable on a schedule and based upon the same conditions as the bonus for Phase I.

A defendant waives the statute of frauds by failing to raise it in the answer or on a motion to dismiss [CPLR 3211(e); *Roland v Benson*, 30 AD3d 398 (2nd Dept. 2006); *Con-Solid Contracting, Inc. v Litwak Development Corp* ., 236 AD2d 437 (2nd Dept. 1997); see *Blechner v Pecoraro*, 164 AD2d 878 (2nd Dept. 1990)]. As Crescent has failed to raise the statute of frauds until now, that objection to its liability for the balance of the bonuses has been waived.

Defendant argues that the bonus incentive is unenforceable because past consideration is insufficient to support a contractual obligation [*Gutman v Gutman*, 31 AD3d 709 (2nd Dept. 2006), lv app

den 8 NY3d 803 (2007); *Clark v Bank of New York*, 185 AD2d 138 (1st Dept. 1992)]. Plaintiff argues that defendant's admission, that its promises to pay were conditioned on future performance, precludes summary judgment.

Overall, the Court is compelled to conclude that the documentary evidence provided in this case is ambiguous, and consequently, the construction of these ambiguous documents is for the trier of fact [*Shadlich v Rongrant Associates*, LLC, 66 AD3d 759 (2nd Dept. 2009); *Spears* v *Spears Fence, Inc.*, 60 AD3d 752 (2nd Dept. 2009); *County of Orange v Carrier Corp.*, 57 AD3d 601 (2 nd Dept. 2008)]. Under these circumstances defendant 's request for summary judgment dismissing the second and fourth causes of action must be denied.

In summary, defendant's motion for summary judgment dismissing the complaint is granted as to the first, third, and fifth causes of action, and denied as to the second and fourth causes of action.

Dated: DEC 01 2009

J.S.C.