

Gyamfi v Lawrence Ruben Co., Inc.

2010 NY Slip Op 30228(U)

January 22, 2010

Supreme Court, New York County

Docket Number: 102521/2009

Judge: Joan M. Kenney

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

PRESENT: JOAN M. KENNEY

PART 8

Index Number : 102521/2009

GYAMFI, NANA K.

vs

ARCTURUS GROUP, LLC

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 102521/09
MOTION DATE 1/04/10
MOTION SEQ. NO. 001 + 002
MOTION CAL. NO. -

The following papers, numbered 1 to _____ 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

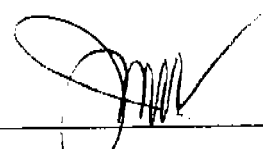
MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED

FEB 02 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/22/10



J.S.C.
JOAN M. KENNEY

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 8

-----x

NANA K. GYAMFI,

Plaintiff,

Index No.
102521/2009

-against-

LAWRENCE RUBEN COMPANY, INC. and
ARCTURUS GROUP, LLC,

Motion Sequence
Numbers 001 and 002

Defendants.

-----x

KENNEY, JOAN, M., J.,

For Plaintiff:
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24 West 40th Street
New York, New York 10018
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New York, New York 10022
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FILED
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Papers considered in review of this petition to reverse, and pre-answer cross-motion seeking to dismiss:

Papers	Numbered
Notice of Motion	1
Affirmation, affidavits and Exhibits	2-7
Affirmation and Affidavits with Exhibits in Opposition to Cross-Motion	6-14
Reply Memorandum of Law in Support of Cross-Motion	15

Motion sequences 001 and 002 have been consolidated for decision.

Plaintiff Nana Gyamfi commences the instant action against his former employers, Lawrence Ruben Company, Inc. (LRC) and Arcturus Group, LLC (AGL, and LRC, collectively, the Defendants), for wrongful termination. The complaint alleges that Defendants discriminated against plaintiff because of his physical disability, which constituted a violation of section 296 of New York State Executive Law, and section 8-107 of the Administrative Code of the

City of New York (the Administrative Code). The complaint also alleges that Defendants conspired to violate New York's Human Rights Law in wrongfully terminating his employment.

AGL moves, pursuant to CPLR 3211 (a) (1) and (7), seeking dismissal of the complaint (motion sequence number 001). LRC moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint (motion sequence number 002). Plaintiff opposes both motions. Defendants' motions are consolidated for disposition, and for the reasons stated herein, both motions are denied.

Background

The complaint alleges that plaintiff was hired by LRC on December 15, 2006, to be the driver for Jonathan Mayblum, who was LRC's then president and later AGL's Chief Executive Officer. Complaint, ¶¶ 3, 6. At the time he was hired, plaintiff allegedly told Mayblum and others that he suffered from chronic back pain and was recovering from a back injury. *Id.*, ¶ 7. Besides being the driver for Mayblum and his family, plaintiff was allegedly asked by Mayblum to move furniture in his house. *Id.*, ¶ 8. The strain from moving furniture allegedly exacerbated plaintiff's physical condition, which caused him to seek medical attention. *Id.*, ¶ 9. On September 19, 2007, plaintiff went to an orthopedist for treatment, and was placed on temporary disability. *Id.*, ¶ 11. On the same day, plaintiff asked Mayblum's secretary, Theresa McCrudden, for the office's facsimile number so that he could

transmit to Mayblum a copy of the doctor's disability certificate. *Id.*, ¶ 12. McCrudden replied that she needed to speak to Mayblum, but she never called plaintiff back that day. *Id.* On September 20, 2007, Mayblum called, by telephone, to tell plaintiff that he was terminated. *Id.*, ¶ 13. On September 25, 2007, plaintiff received a letter of termination in the mail, with no explanation as to why he was discharged from employment. *Id.*, ¶ 16.

The complaint alleges that from the time that plaintiff was employed in December 2006 until September 2007, he received all (except for the last one or two) of his paychecks from LRC. Complaint, ¶ 17. In September 2007, without any notice or explanation, plaintiff received his paychecks from AGL instead. *Id.*, ¶ 18. According to the complaint, the reason for the payroll switch was that Mayblum had decided not to make any "reasonable attempt to accommodate" plaintiff's disability, and to "terminate him because of his medical condition and temporary disability." *Id.*, ¶ 18. The complaint further alleges that, because Mayblum is an attorney and knows that New York's Human Rights Law, including provisions which make it illegal for employers to discriminate against employees based on physical disability, do not apply to employers with fewer than four employees, a decision was made to transfer plaintiff from LRC to AGL, which purportedly had fewer than four employees, in an attempt to avoid liabilities under New York's anti-discrimination laws. *Id.* Plaintiff seeks compensatory

and punitive damages for the allegedly wrongful employment termination. *Id.*, ¶ 26.

Applicable Legal Standards

In setting forth the standards for granting or denying a motion for summary judgment, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]), the following:

As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Adhering to the foregoing guidance, the courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief may be granted. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974) (because entry of summary judgment "deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997) (in considering a motion for summary judgment, "evidence should be analyzed in the light most favorable to the party opposing the motion"). Conclusory

allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion. *Alvarez*, 68 NY2d at 324-25.

On the other hand, in considering a CPLR 3211 motion to dismiss, the court is required to determine whether a plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002). The pleadings are to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87 (1994). Moreover, "[w]hen the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether [he or] she has stated one." *Asgahar v Tringali Realty Inc.*, 18 AD3d 408, 409 (2d Dept 2005) (citation omitted). If the complaint's allegations consist of bare legal conclusions and "documentary evidence flatly contradicts the factual claims, the entitlement to the presumption of truth and the favorable inference is rebutted." *Scott v Bell Atlantic Corp.*, 282 AD2d 180, 183 (1st Dept 2001).

Discussion

1. LRC's Summary Judgment Motion

In the instant case, as support for its summary judgment motion, LRC relies primarily on the affidavit of Susanne Lieu, its vice president and general counsel. Lieu argues that summary judgment should be granted in favor of LRC, because LRC did not employ the plaintiff on the date of his termination, nor was LRC responsible for his employment termination. Lieu Affidavit, ¶ 2. Lieu also asserts that LRC has no relationship with or interest in AGL, and that Mayblum holds no interest in LRC. *Id.*, ¶¶ 8-9. Lieu further asserts that Mayblum's employment at LRC ended on May 4, 2007, when he voluntarily left to start his own business. *Id.*, ¶ 10. In addition, LRC attaches as "Exhibit C" to the Lieu Affidavit the motion to dismiss by AGL, which encompasses a short two-paragraph affirmation by Mayblum in support of the motion to dismiss. In his affirmation, Mayblum states that the employment of plaintiff at AGL "ended on or about September 20, 2007, when his position was eliminated. At that time, and throughout Plaintiff's employment, [AGL] only had two employees (including me)." Mayblum Affirmation, ¶ 2.¹

LRC's motion for summary judgment should be denied for the

¹New York Executive Law § 292(5) states that "[t]he term 'employer' does not include any employer with fewer than four persons in his employ." Also, Administrative Code § 8-102(5) states that "the term employer does not include any employer with fewer than four persons in his or her employ."

following reasons. First, while it is undisputed that plaintiff was employed by LRC, LRC has not proffered any letter or document evidencing its termination of plaintiff's employment, other than the statement made by its general counsel in the Lieu Affidavit that plaintiff was terminated on August 14, 2007,² and the payroll records which purportedly showed that plaintiff's payroll was switched over to AGL beginning with the payroll period ending August 24, 2007. The payroll records are annexed as "Exhibit C" to the Reply Affidavit of Joseph Zarrella, controller of LRC (the Zarrella Affidavit).³ In contrast, when plaintiff was terminated by AGL on or about September 20, 2007, he was provided with a letter of termination, as well as a proposed severance and release agreement (which he never signed). Copies of the termination letter and proposed release are annexed as "Exhibit 6" to plaintiff's affidavit opposing Defendants' motions.⁴

Moreover, plaintiff states that throughout his employment, it was clear to him that he was employed by LRC, as evidenced by the

² LRC's answer to the complaint states that plaintiff's employment was terminated on August 10, 2007. Answer, ¶ 10.

³ The Zarrella Affidavit states that Mayblum moved out of LRC's office at 600 Madison Avenue on or about July 31, 2007. *Id.*, ¶ 5. The Zarrella Affidavit also states that, as an accommodation to Mayblum, LRC set up a payroll account for AGL, and until August 14, 2007 when that account was set up, LRC continued to pay plaintiff on behalf of AGL, and LRC was allegedly reimbursed by Mayblum for such payments. *Id.*, ¶ 7.

⁴ Plaintiff's original affidavit was not notarized. The defect was subsequently cured by a notarized affidavit.

payroll checks that were issued to him by LRC, copies of which are annexed to his affidavit. Plaintiff's Affidavit, ¶ 10; Exhibit 3. Plaintiff also states that, even in September 2007, when he was transferred from LRC's to AGL's payroll (and was terminated quickly thereafter), he performed the same duties as he did when he was an LRC employee, namely, serving as Mayblum's driver. *Id.*, ¶ 10. Plaintiff further states that neither Mayblum nor anyone else informed him of the purported transfer, until he noticed that his last payroll checks were from a company that he had never heard of (i.e., AGL), which, according to the AGL payroll checks, ostensibly shared the same postal address (600 Madison Avenue, New York) as LRC. *Id.*, ¶ 10; Exhibit 4. However, when plaintiff attempted to mail, via certified mail, a copy of the doctor's disability certificate to Mayblum, which was addressed to AGL at 600 Madison Avenue, the mail was returned as undeliverable as addressed. *Id.*; Exhibit 5. These allegations are essentially undisputed by LRC. LRC takes the position that plaintiff's employment was terminated solely by AGL, not LRC.

Notably, although the Lieu Affidavit states that Mayblum's employment with LRC was terminated on May 4, 2007, an internet search performed on May 7, 2008, indicated that Mayblum was still a member of LRC's "executive team," and he was LRC's "president" on that date. A copy of the internet search report (the Search Report) is attached as "Exhibit 7" to the Kenneth McCallion

Affirmation in Opposition to Defendants' motions. LRC has failed to address or refute the negative implications raised by the Search Report, which, along with other documents that are annexed as exhibits to plaintiff's affidavit, raise factual issues with respect to the veracity or accuracy of the statements made by LRC. Further, no discovery has been conducted by the parties prior to the filing of this summary judgment motion. Because discovery may assist the parties (and this court) in narrowing or resolving disputed issues of fact, the summary judgment motion is denied without prejudice. *Magee v County of Suffolk*, 14 AD3d 664 (2d Dept 2005); *Perroto Dev. Corp. v Sear-Brown Group*, 269 AD2d 749 (4th Dept 2000) (denying summary judgment motion without prejudice to renew, after completion of discovery).

2. AGL's Motion to Dismiss

AGL's motion to dismiss is made pursuant to CPLR 3211 (a) (1) and (a) (7). The sole "documentary evidence" initially submitted by AGL in support of dismissal is Mayblum's affirmation, which asserts that plaintiff's employment at AGL terminated on September 20, 2007, and that AGL had two employees (including Mayblum himself) throughout plaintiff's employment at AGL. Yet, the termination letter written by Mayblum's assistant, Theresa McCrudden, indicated that she also was working for AGL, which apparently contradicts Mayblum's statement that AGL only had two employees (including Mayblum) throughout plaintiff's employment.

Moreover, the payroll records annexed as "Exhibit D" to the Zarrella Affidavit indicate that AGL hired McCrudden, "effective September 10, 2007." As such, this raises an issue regarding the accuracy or veracity of Mayblum's affirmation.

The complaint alleges that LRC was plaintiff's defacto employer, which undisputedly has more than four employees and therefore is subject to New York's Human Rights Law, and that AGL conspired with LRC to terminate plaintiff by shifting his employment from LRC to AGL without his consent or knowledge. Hence, the complaint adequately alleges a cause of action against the Defendants. Although the selective payroll records annexed to the Zarrella Affidavit suggest that AGL might have fewer than four employees, these records were submitted only after plaintiff opposed Defendants' motions, without affording plaintiff an opportunity to review or examine their authenticity and accuracy. In any event, "[t]he facts alleged in the complaint are assumed to be true at this stage of the litigation. Therefore, Plaintiff has sufficiently pled that Defendants are 'employers' covered by the provisions of [New York City's Human Rights Law.]" *Rockmore v Antell*, 2008 WL 4443951 at *3, 2008 U.S. Dist LEXIS 78899 at *8 (SD NY 2008), *affd* 2009 WL 3806393, 2009 US App LEXIS 25022 (2d Cir 2009) (plaintiff's complaint dismissed on other grounds).

In response to the complaint's allegation that plaintiff was transferred from LRC to AGL as a subterfuge to avoid liability

under New York's employment and disability laws, AGL proffered (only after plaintiff submitted his opposition to AGL's motion to dismiss) a second affirmation by Mayblum in further support of the motion to dismiss. Attached to Mayblum's second affirmation are copies of various documents, such as AGL's certificate of organization, AGL's lease at 230 Park Avenue, and invoices from LRC to Mayblum requesting reimbursement by Mayblum of payroll and other benefits provided by LRC to plaintiff and McCrudden. These documents purport to show that AGL is not just a "paper company," as alleged by plaintiff, but a bona fide business entity. Yet, plaintiff has not been afforded a chance to respond to these belatedly submitted documents. *ME Corp. S.A. v Cohen Bros. LLC*, 292 AD2d 183, 185 (1st Dept 2002) (reversing trial court's decision to dismiss certain of plaintiff's claims because plaintiff was not afforded an opportunity to respond to defendant's belated submission of documentary evidence).

Also, just like LRC, neither AGL nor Mayblum have addressed nor rebutted the adverse implications raised by the Search Report that Mayblum was still associated with LRC even after plaintiff's employment was terminated. Because the "documentary evidence" submitted by AGL does not conclusively establish a defense to plaintiff's claim as a matter of law, and because this court is required to accord plaintiff the benefit of every possible favorable inference in the context of a motion to dismiss, AGL's

motion to dismiss is denied, without prejudice. *Tsimerman v Janoff*, 40 AD3d 242 (1st Dept 2007) (denying motion to dismiss based on documentary evidence because defendants' affidavits and documents did not conclusively establish a defense to the claims asserted by plaintiff as a matter of law).

Accordingly, in light of the foregoing, it is

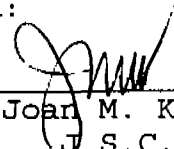
ORDERED that the motion to dismiss by defendant Arcturus Group, LLC (motion sequence number 001) is hereby denied; and it is further

ORDERED that the motion for summary judgment by defendant Lawrence Ruben Company, Inc. (motion sequence number 002) is hereby denied; and it is further

ORDERED, that the parties appear for a preliminary conference at 71 Thomas, Room 304 at 9:30 a.m. on February 4, 2010.

Dated: January 22, 2010

ENTER:



Hon. Joan M. Kenney
J.S.C.

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