

Greengrove v Iliad Design, LLC

2011 NY Slip Op 30752(U)

March 29, 2011

Supreme Court, New York County

Docket Number: 114092/09

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

PRESENT:

PART 15

Index Number: 112044/2010

GREENGROVE, KARL

vs

ILIAD DESIGN, LLC

Sequence Number : 001

DISMISS

INDEX NO. 112044/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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 _____

PAPERS NUMBERED

1, 2

3

4, 5, 6

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

MAR 31 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/29/11

[Signature]

HON. EILEEN A. RAKOWER

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 15

-----X
KARL GREENGROVE,

Plaintiff,

Index No.114092/09

Mot. Seq. 001

Decision and Order

- against -

ILIAD DESIGN, LLC, IBB. BREWSTER & BROWN-NEW YORK,
LLC., ILIAD ANTIK, ADAM BROWN and ANDREA ZEMEL,

FILED

Defendants.

MAR 31 2011

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HON. EILEEN A. RAKOWER, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Defendants bring this pre answer motion to dismiss, by notice of motion dated November 5, 2010. Appended to the instant motion is an attorney affirmation, the affidavit of defendant, Adam Brown, and W-2 Wage and Tax Statements for plaintiff issued in the years 2006, 2007, 2008 and 2009. Defendants do not provide the summons and complaint.

Defendants argue first, that all causes of action must be dismissed as against Iliad Design, LLC. since it never employed plaintiff, and all causes of action alleged against it arise out of plaintiff's employment. Further, on behalf of all defendants, they urge that none meet the statutory definition of "employer," as none employed four or more employees, citing to New York State's Executive Law §292(5) and New York City Administrative Code §8-102(5). With respect to defendants Brown and Zemel in their individual capacity, defendants urge that claims against them are only actionable if the claims against the employer remain. Finally, defendants seek dismissal of the first and second causes of action as defective for failure to properly plead such discrimination.

Plaintiff brings a cross motion seeking an extension of time to oppose, filed January 19, 2011, after three stipulations consenting to extensions of time to oppose failed to prove sufficient. Plaintiff does append the summons and complaint to his papers.

Plaintiff alleges that both Adam Brown and Andrea Zemel are principals of Iliad Design, LLC, IBB Brewster & Brown New York, LLC and Iliad Antik. Iliad Design is an art gallery, in the business of displaying, buying and selling art. Both Brown and Zemel are responsible for supervising the daily activities and operations of the art gallery. Plaintiff contends he was an employee of all three entities, working at the art gallery, under the supervision of Brown and Zemel. His employment commenced on February 1, 2001 as Gallery Manager pursuant to a verbal agreement (plaintiff does not designate who he made this verbal agreement with). Plaintiff maintains that he continued in his employment, receiving his agreed upon compensation, until sometime on or about June 2009. Plaintiff contends that he had an informal meeting with Brown and Zemel at that time, and requested but was denied a raise. Further, on or about June 2009, plaintiff claims he informed Brown and Zemel that he was suffering from severe depression and was on a suicide watch. Plaintiff required a "sponsor who was expected to call Plaintiff throughout the day." Plaintiff alleges that Brown and Zemel insisted that the sponsor stop calling plaintiff at work. Plaintiff next claims that on or about July 2009, he was asked by both Brown and Zemel to move heavy furniture, a task beyond his job description, which caused him to sustain a hernia. Plaintiff alleges that he was "instructed not to contact Workers Compensation as Defendants owed a large payment to Workers Compensation." Plaintiff ultimately required surgery, and took a leave of absence from work commencing August 17, 2009. Defendants terminated plaintiff's employment "via email based on poor performance" on or about August 28, 2009. Finally, plaintiff claims defendants failed to pay him commissions owed for the months of June, July and August 2009.

Initially, the cross-motion to extend the time to oppose is denied. It is well settled that plaintiff is not required to submit an affidavit, or any other evidentiary support, in opposition to a motion to dismiss pursuant to CPLR 3211 (*See Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]).

On a motion to dismiss pursuant to CPLR 3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or

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her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

Defendants, in support of their contention that defendants do not meet the statutory definition of “employer,” submit Brown’s affidavit. Affidavits do not qualify as “documentary evidence,” which would support a motion to dismiss under CPLR 3211(a)(1). (*Williamson Picket Gross, Inc. v. Hirschfeld*, 92 AD2d 289 [1st Dept 1983]). Further, the W-2 Wage and Tax Statements submitted as evidence that plaintiff worked solely for I. Brewster & Brown NY, LLC d/b/a Iliad Antik, without more, fail to “conclusively” establish that Iliad Design LLC was not plaintiff’s employer, as alleged in plaintiff’s complaint. Defendants also attempt to explain the employment relationship of a proposed intern, and an independent contractor. However, plaintiff is entitled to discovery on this issue, and to dismiss at this juncture, based on a self serving affidavit and W-2 forms, is inappropriate.

Defendants attempt to supplement their initial submission with several items of evidence in reply. However, a movant may not “remedy basic deficiencies” contained in the initial moving papers by submitting new evidence in reply, even if that evidence is in response to plaintiff’s opposition. (*See Merchants Bank of New York v. Gold Lane Corp.*, 28 AD3d 266 [1st Dept. 2006]).

Plaintiff alleges that he requested and was refused reasonable accommodation for his suicidal tendencies. Further, he alleges a work related injury, for which he was told not to put in a claim with Worker’s Compensation. He claims his firing, when he left to have surgery for that injury, was prompted by “discriminatory animus.” The complaint states

Given the close temporal proximity between Plaintiff’s medical condition, surgery and mental health condition (severe depression) the stated reason of poor performance for Plaintiff’s termination was a mere pretext motivated by discriminatory animus and intended to obscure the act.

The court’s task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory.” (*Ladenburg Thalmann & Co., Inc. v. Tim’s Amusements*,

Inc., 275 AD2d 243, 245[1st Dept. 2000]).

Wherefore, it is hereby

ORDERED that the cross motion is denied; and it is further

ORDERED that the motion to dismiss is DENIED in all respects.

DATED: March 29, 2011



EILEEN A. RAKOWER, J.S.C.

FILED

MAR 31 2011

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