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

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 101705/2011
ORTIZ, LUIS
VS.
HAIER AMERICA TRADING LLC
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 101705/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 1, 2, 3

Answering Affidavits — Exhibits 4, 5

Replying Affidavits 6

FILED

MAY 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 5/24/11

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

LUIS ORTIZ,

Plaintiff,

Index No.
101705/11

Mot. Seq. 001
Decision and
Order

- against -

HAIER AMERICA TRADING, LLC, JOSE MENDOSA, *Individually*, and JOHN KRAMER, *Individually*,

Defendants.

----------X

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

Plaintiff brings this action for sexual harassment, discrimination and unlawful retaliation in violation of his human rights under §§296(6) and 296(7) of the New York State Executive Law[1], and several sub-sections of §8-107 of the New York City Administrative Code. Plaintiff also brings claims for discrimination under New Jersey anti-discrimination laws.

Plaintiff started working for defendant Haier America Trading LLC ("Haier") on January 17, 2004 as a Front Desk Security and Concierge at Haier's office located in New York City. In or about July 2008 plaintiff was promoted to the position of Inventory Control Analyst, and in April 2009, plaintiff was transferred to work in Haier's New Jersey warehouse.

Plaintiff alleges that, while he was working at the New Jersey warehouse, he was sexually harassed by his co-worker, defendant Jose Mendosa. Plaintiff claims that starting on or around May 28, 2009, Mr. Mendosa began making unwanted

[1]Plaintiff amended his complaint as of right while the instant motion was pending and the amended complaint contains discrimination claims under the New York State Human Rights Law ("NYSHRL").

sexually suggestive comments to him, and, in one instance, Mr. Mendosa walked up behind plaintiff and "rubbed . . . his head and arm." Plaintiff claims he told Mr. Mendoza that he was not gay, that his advances were not welcome and that he wanted him to stop making comments. When plaintiff told another male co-worker about Mr. Mendoza, the co-worker claimed that he too had been harassed.

On June 4, 2009, plaintiff reported the alleged harassment to his supervisor, Mr. Nieven, and to Mr. Mendosa's supervisor, Mr. Lemondon. On June 8, 2009, defendant John Kramer, Haier's Warehouse Manager, gave plaintiff a termination letter which allegedly came from Haier's New York City headquarters. The letter informed plaintiff that Haier was "downsizing" and that his position was "no longer needed." However, plaintiff claims, only weeks after he was fired, his position was filled. Thereafter, plaintiff commenced the instant lawsuit.

Haier now moves to dismiss the complaint pursuant to CPLR 3211(a)(2), for lack of subject matter jurisdiction. If the complaint is not dismissed on those grounds, Haier argues that it should be dismissed pursuant to the doctrine of *forum non conveniens*. Haier also argues that plaintiff did not follow the proper protocol because he failed to notify the New York City Commission on Human Rights within 10 days after commencing the instant action. Finally, Haier moves to dismiss the New Jersey human rights violation claims, asserting that New York courts have no jurisdiction over those claims. Plaintiff opposes.

Haier, in support of its motion, first argues that, as the alleged misconduct occurred in New Jersey, plaintiff cannot bring an action under the New York City Human Rights Law ("NYCHRL"). Haier points to the location of the occurrence in support of its forum non conveniens argument. Finally, Haier asserts that pursuant to §805-2(c) of the NYCHRL, plaintiff had to have served a copy of his complaint on Human Rights Commission within ten days after he commenced the instant suit.

Plaintiff, in opposition, argues that the Court has jurisdiction over his NYCHRL claims because he is a New York resident and because Haier is a New York corporation. As to his state law claim, plaintiff asserts that New York Executive Law 298-a extends the protections of the NYSHRL to acts "committed outside this state against a resident of this state . . ." Plaintiff asserts that §8-502(c) does not create a condition precedent to bringing a claim under the NYCHRL.

CPLR 3211(a)(2) states:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more cause of action asserted against him on the ground that:
>
> > (2) the court has not jurisdiction of the subject matter of the cause of action.

Initially, as Haier concedes in its reply papers, plaintiff's New York State residency status entitles plaintiff to protection under the NYSHRL, despite the fact that the alleged discrimination and retaliatory termination occurred in New Jersey. Executive Law 298-a(1), which expanded the jurisdiction of the NYSHRL in July of 2000, states:

> The provisions of this article shall apply as hereinafter provided to an act committed outside this state against a resident of this state or against a corporation organized under the laws of this state or authorized to do business in this state, if such act would constitute an unlawful discriminatory practice if committed within this state.

As to plaintiff's sexual harassment claims under the NYCHRL, the alleged acts did not occur in New York City. Thus, the NYCHRL would not apply to those causes of action. (see *Wilkinson v. Community Preservation Corporation*, 74 AD3d 405[1st Dept. 2010]).

Plaintiff submits a termination letter sent from Haier's New York City Office, and claims that a discriminatory act occurred in New York City because the decision to terminate him was made at Haier's New York headquarters. It is well settled that "the locus of the decision to terminate . . . is of no moment." Rather, the significant question is where the impact of that decision is felt. (*Shah v. Wilco Systems, Inc.*, 27 AD3d 169[1st Dept. 2005]).

In *Hoffman v. Parade Publications*, 15 NY3d 285[2010]), the court found that a non-resident whose termination letter was issued out of his company's New York City office, was not entitled to NYCHRL protections because he did not work in the City. In *Shah*, the plaintiff worked in New Jersey and the acts of discrimination

allegedly occurred at her workplace in New Jersey. However, the plaintiff there argued that the NYSHRL applied because the decision to terminate occurred in New York. The court held that "even if the termination decision had been made in New York City, the NYCHRL would not apply since its impact on her occurred in New Jersey, not within the five boroughs." (*Shah* at 176). Here, as in *Shah*, the decision to terminate plaintiff, even if made in New York City, would have an impact at plaintiff's workplace in New Jersey.

Plaintiff contends that since he is a resident of New York City, and Haier has its headquarters here, NYCHRL should apply nevertheless. However, the court in *Wahlstrom v. Metro-North Commuter Railroad Company*, 89 F.Supp.2d 506[SDNY 2000]), without giving consideration to either the residency of the plaintiff, or the location of defendant's principal place of business, held that "the NYCHRL only applies when the actual impact of the discriminatory conduct or decision is felt within the five boroughs, even if a discriminatory decision is made by an employer's New York City Office." (*Id.* at 528).

Plaintiff does not object to Haier's motion to the extent that it seeks to dismiss plaintiff's causes of action for discrimination under New Jersey state law. Thus, those causes of action are dismissed without opposition.

Finally, some of the factors to consider in determining whether jurisdiction should be retained in New York under the doctrine of *forum non conveniens*, include "the difficulties for defendant in litigating the claim in this State, the burden on the New York courts in entertaining the suit and the availability of another more convenient forum in which plaintiff may obtain redress." (*Waterways, Ltd. v. Barclays Bank PLC*, 174 AD2d 324,327[1st Dept. 1991]). It is well established that, "unless the balance [of these factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." (*Id.*). Here, plaintiff is a New York domiciliary, and Haier is a New York corporation. Further, commuting from New Jersey to New York City for trial does not impose a substantial burden on the moving defendants.

Wherefore, it is hereby

ORDERED that the motion is granted to the extent that the first, second, third, fourth, fifth, ninth, tenth and eleventh cause of action of the amended complaint are

dismissed; and it is further

ORDERED that defendant[s] are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

DATED: May 24, 2011

EILEEN A. RAKOWER, J.S.C.