

Brathwaite v Intrepid Museum Found., Inc.

2011 NY Slip Op 32212(U)

August 8, 2011

Sup Ct, NY County

Docket Number: 109454/10

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

~~FROM THE COURT OF APPEALS~~

PRESENT:

PART 15

Index Number : 109454/2010

BRATHWAITE, CINQUE

vs

INTREPID MUSEUM FOUNDATION

Sequence Number : 001

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

DISMISS

No(s). 1, 2

Answering Affidavits — Exhibits _____ No(s). 3

Replying Affidavits _____ No(s). 4

Upon the foregoing papers, it is ordered that this motion is

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

FILED
AUG 11 2011
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/8/11



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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

CINQUE BRATHWAITE,

Plaintiff,

- against -

THE INTREPID MUSEUM FOUNDATION, INC.,
BILL WHITE, DARREN STONE, SUSAN SEDWIN,
and other employees of INTREPID MUSEUM
FOUNDATION, INC.,

Defendants,

-----X

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

Index No.
109454/10

**DECISION
and ORDER**

Mot. Seq.
001

Cinque Brathwaite (“Plaintiff”) was employed by defendant Intrepid Museum Foundation (“Intrepid”) as “IT manager” from March 4, 2009 until May 18, 2009. In this capacity, Plaintiff was responsible for overseeing operations of Intrepid’s IT department and hiring staff. Plaintiff, an African-American male, states that, upon being hired, he “was immediately shocked by the pervasive and openly discriminatory and hostile nature of the workplace....” He alleges that he “endured daily ‘hazing’ and racial comments” from defendant Darren Stone, Vice President of Intrepid, and the hazing only intensified when he indicated his disapproval of Stone’s behavior.

Plaintiff claims that Stone constantly made racist, sexist, and homophobic comments in the workplace, and allowed and encouraged such behavior from Intrepid employees. When Plaintiff attempted to reprimand employees for engaging in this conduct, Plaintiff himself was reprimanded by Stone. On one occasion Stone allegedly called Plaintiff a “golliwog,” which Plaintiff states is “a British colonial racist term that is the equivalent of [the n-word].” Plaintiff states that Stone is a British national.

Plaintiff was terminated by Intrepid on May 18, 2009. Plaintiff states that, less than a month earlier, on April 30, 2009, he “received a strongly positive performance

review.” Plaintiff alleges that he was unlawfully terminated on the basis of his race, and in retaliation for complaining about Stone’s behavior and the work environment created and countenanced thereby. Plaintiff now sues Intrepid, Stone, and defendants Bill White and Susan Sedwin, former President and Human Resources Director of Intrepid, respectively. Plaintiff alleges unlawful discrimination and retaliation under Executive Law §§296 & 297 and the NYC Admin. Code, negligent hiring and retention, and intentional infliction of emotional distress.

Presently before the court is a motion by Intrepid, Stone and Sedwin (collectively “moving defendants”) for dismissal under CPLR §3211. Moving defendants claim that the court lacks subject matter jurisdiction because Plaintiff filed a complaint with the New York State Division of Human Rights (“SDHR”) concerning the allegations herein. Moving defendants annex Plaintiff’s SDHR complaint to their moving papers. In that proceeding, Plaintiff alleged that Intrepid (the sole named respondent) “subjected [him] to disparate treatment including but not limited to, being subjected to off color jokes, having objects thrown at [him], and subjecting [him] to a hostile work environment.” He also alleged that he was unlawfully terminated based upon his race. By Determination and Order After Investigation dated October 13, 2009, SDHR dismissed Plaintiff’s complaint, finding that there was “NO PROBABLE CAUSE to believe that the respondent has engaged in or is engaging in the unlawful discriminatory practice complaint of.”

CPLR §3211 provides, in relevant part:

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

Executive Law §297(9) provides that “Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages . . . *unless such person had filed a complaint hereunder or with any local commission on human rights...*” (emphasis added). §297(9) further provided an exception when a complaint is dismissed for “administrative convenience.” It is well settled that a plaintiff who previously filed

a complaint with the SDHR is barred from raising any causes of action which arise out of the same facts and circumstances as the acts complained of in the SDHR complaint (*see Emil v. Dewey*, 49 N.Y.2d 968 [1980]; *Jones v. Gilman Paper Co.*, 166 A.D.2d 194 [1st Dept. 1990]). “The jurisdictional bar is not avoided by changing the legal theory of relief relied upon” (*Borum v. Village of Hempstead*, 590 F. Supp. 2d 376, 383 [E.D.N.Y. 2008], *citing Bhagalia v. State*, 228 A.D.2d 882 [3rd Dept. 1986]).

Here, all of Plaintiff’s causes of action arise out of the same facts and circumstances as his SDHR complaint. Specifically, Plaintiff once again alleges that, during the course of his employment with Intrepid from March through May 2009, Plaintiff was subjected to racial discrimination and a hostile work environment, and was ultimately terminated because of his race. While Plaintiff’s complaint adds more detail in the form of specific incidents of racial discrimination, and asserts alternate theories of recovery, neither is sufficient to save his complaint from dismissal based upon his election to pursue a SDHR complaint (*see Low v. Gibbs & Hill, Inc.*, 92 A.D. 2d 467, 468 [1st Dept. 1983] (“Although the third cause of action is couched in terms of conspiracy, it is obvious that its essential thrust is the same as that contained in the complaint filed by plaintiff with the State Division of Human Rights.”)). Similarly, the addition of defendants not named in the SDHR complaint does not alter the fact that the court is divested of subject matter jurisdiction based on Plaintiff’s election of remedies (*see Hirsch v. Morgan Stanley & Co.*, 239 A.D.2d 466, 468 [2nd Dept. 1997] (“since the Supreme Court was deprived of its subject matter jurisdiction to consider her cause of action when she commenced the administrative action against the corporate defendant, she could not commence an action in the court, arising out of the same facts, against an additional defendant who was not named in the administrative complaint or referred to in the administrative determination.”)).

Wherefore it is hereby

ORDERED that the motion of defendants Intrepid, Stone and Sedwin to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining

defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

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

DATED: August 8, 2011



EILEEN A. RAKOWER, J.S.C.

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NEW YORK