

**Dollar v Republic Empl. Agency, Inc.**

2011 NY Slip Op 33120(U)

November 28, 2011

Supreme Court, New York County

Docket Number: 109041/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

SHARDAE DOLLAR,

Plaintiff,

-v-

REPUBLIC EMPLOYMENT AGENCY, INC. and  
TONY FREDDO, Individually,  
Defendants.

INDEX No. 109041/11

MOTION DATE \_\_\_\_\_

MOTION SEQ. No. 001

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1+2

Answering Affidavits- Exhibits \_\_\_\_\_ 3

Replying Affidavits \_\_\_\_\_

CROSS-MOTION: \_\_\_\_\_ YES  NO

**FILED**

DEC 02 2011

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

NEW YORK  
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM

DECISION.

Dated: 11/28/11

*Donna M. Mills*  
J.S.C.

**DONNA M. MILLS, J.S.C.**

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

-----X  
SHARDAE DOLLAR,

Plaintiff,

Index No.

-against-

109041/11

REPUBLIC EMPLOYMENT AGENCY, INC.  
and TONY FREDDO, Individually,  
Defendants.  
-----X

**DONNA MILLS, J. :**

Defendants Republic Employment Agency, Inc. ("Republic") and Anthony Fiumefreddo (improperly named as Tony Freddo, hereinafter "Fiumefreddo") move for partial summary judgment pursuant to CPLR § 3212 to dismiss Plaintiff's claims pursuant to New York City Human Rights Law (the first four causes of action found in Plaintiff's complaint), and dismissing Plaintiff's intentional infliction of emotional distress claim for allegedly being duplicative of Plaintiff's assault and battery claims. Plaintiff opposes the motion.

Defendant Republic is an employment agency located in lower Manhattan. Mr. Fiumefreddo is the sole owner of Republic. During the course of Plaintiff's short employment with Republic from May 12, 2011 until June 22, 2011, Plaintiff claims to have been subjected to a hostile work environment, discrimination and retaliation in violation of the New York City Human Rights Law. Claims of assault, battery and intentional infliction of emotional distress are also asserted. On or about August 5, 2011, the Plaintiff filed the complaint herein alleging seven causes of action against the Defendants.

On or about September 6, 2011, the Defendants' filed an answer essentially denying the material allegations of the complaint and also affirmatively stating that Republic was not an employer under the New York City Human Rights Law. In its moving papers, Fiumefreddo asserts in an affidavit that Republic is a subchapter S corporation and at the time Plaintiff began working for Republic only two other employees were working for the company. As such, Fiumefreddo asserts that Republic does not have the requisite number of employees to be considered an employer under the New York City Human Rights Law.

Section 8-107 of the New York City Human Rights Law provides as follows:

1. Employment. It shall be an unlawful discriminatory practice:
  - (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

Section 8-102 of the New York City Human Rights Law provides as follows:

5. For purposes of subdivisions one, two and three of section 8-107 and section 8-107.1 of this chapter the term "employer" does not include any employer with fewer than four persons in his or her employ. For purposes of this subdivision, natural persons employed and independent contractors to carry out work in furtherance of an employer's business

enterprise who are not themselves employers shall be counted as persons in the employ of such employer.

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, 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 (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

As mentioned previously, Defendants contend that at no time during the period in which the alleged harassing behavior occurred did the Defendants' employ four or more persons. Therefore, they argue, the New York City Human Rights Law does not apply to them. In support of their motion, Defendants' submit an affidavit of

Fiumefreddo, who attests that he is the sole stockholder of Republic and that there were only two or three persons working at Republic during the time Plaintiff worked for the company. Specifically, he alleges that in May 2011, the only persons working for Republic were Tom Norman, Shelbi Pinkney and Plaintiff. In June, he claims Ms. Pinkney resigned and thus there were only two individuals working for the company (Plaintiff and Mr. Norman).

In opposition to Defendants' motion, Plaintiff does not dispute that Republic employed fewer than four people. Plaintiff fails to submit any affidavit or admissible evidence concerning the number of individuals working for Republic during her employment. Rather, Plaintiff's papers incorrectly cites to cases that apply a motion to dismiss standard to the facts of this case, rather than the summary judgment standard pursuant to CPLR § 3212. To the extent that Plaintiff relies on the verified complaint to oppose the motion, the complaint sets forth no facts sufficient to support the allegations that Republic had four or more employees working there when she was employed.

Defendants have conclusively established that they are not covered by the Human Rights Law. During the relevant time period there simply were not a sufficient number of employees or contractors to establish jurisdiction over Defendants under that statute. Thus, Plaintiff's Human Rights Law claims must, as a matter of law, be dismissed.

Turning to the branch of defendants' motion that seeks to dismiss plaintiff's seventh cause of action for intentional infliction of emotional distress, plaintiff alleged that Defendants' engaged in extreme and outrageous conduct and as a result she suffered emotional distress. Defendants' maintain that this cause of action must be

dismissed as duplicative of Plaintiff's other tort claims for assault and battery.

To state a cause of action to recover damages for the intentional infliction of emotional distress, the conduct alleged must be so outrageous in character and extreme in degree as to surpass the limits of decency so as to be regarded as atrocious and intolerable in a civilized society (Freihofer v. Hearst Corp., 65 N.Y.2d 135, 143, [1985]). Generally, a cause of action for infliction of emotional distress is not allowed if essentially duplicative of tort or contract causes of action (Murphy v American Home Prods. Corp., 58 NY2d 293, 303 [1983]) Here, the cause of action alleging intentional infliction of emotional distress must be dismissed as duplicative of the causes of action alleging assault and battery, as the outrageous conduct alleged in the complaint stems from the purported assault and battery.

Accordingly, it is

ORDERED that Defendants' motion for partial summary judgment is granted and the Plaintiff's first, second, third, fourth and seventh causes of action are hereby dismissed; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Rom 574, 111 Centre Street on 2/16, 2011, at 10<sup>00</sup> AM.

DATED: 11/22/11

**FILED**  
DEC 02 2011

NEW YORK  
COUNTY CLERK'S OFFICE  
ENTER:

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*[Signature]*

J.S.C.

*[Faint handwritten text]*